SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 258.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, DOUGLAS H. JOHNSON, GOVERNOR OF THE CHICKASAW NATION, ET AL., APPELLANTS,

vs.

THE UNITED STATES EX RELATIONE McALESTER-EDWARDS COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

1 Court of Appeals of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE McAlester-Edwards Coal Company, a Corporation, Appellant,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR; DOUGLAS H. Johnson, Governor of the Chickasaw Nation, and William F. Semple, Principal Chief of the Choctaw Nation.

No. 3695.

Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE McAlester-Edwards Coal Company, a Corporation, Petitioner,

vs.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR; Douglas H. Johnson, Governor of the Chickasaw Nation, and William F. Semple, Principal Chief of the Choctaw Nation, Respondents.

No. 64820. At Law.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 *Petition for mandamus.*

Filed December 10, 1920.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX RELATIONE McAlester-Edwards Coal Company, a Corporation, Petitioner,

vs.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR; Douglas H. Johnson, Governor of the Chickasaw Nation, and William F. Semple, Principal Chief of the Choctaw Nation, Respondents.

No. 64820. At Law.

The petition of the United States of America, on the relation of McAlester-Edwards Coal Company, a corporation, respectfully represents:

I. That said McAlester-Edwards Coal Company is a corporation duly created and organized under the laws of the Indian Territory,

and now existing under and in accordance with the laws of the State of Oklahoma, owning certain properties and conducting certain business as hereinafter more particularly set forth, within the State of Oklahoma; and that said McAlester-Edwards Coal Company brings this its petition for mandamus against John Barton Payne, a resident of the District of Columbia, and Douglas H. Johnson and William F. Semple, residents of the State of Oklahoma, in respect of the matters and things hereinafter set forth; that the said John Barton Payne is the Secretary of the Department of the Interior of the United States; that the said Douglas H. Johnson is the governor of the Chickasaw Nation of Indians, and that the said William F. Semple is principal chief of the Choctaw Nation of Indians; that the said officers, respondents herein, at all of the times hereinafter mentioned had and have the general supervision and control of the lands of the Chickasaw and Choctaw Nations of Indians, subject to the laws and treaties of the United States relating thereto, and that the said respondents are sued hereby in respect of their official duties as hereinafter more particularly set forth.

II. That under the provisions of an act of Congress approved July 1st, 1902 (32 Stat. 641), entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," the Secretary of the Interior of the United States was authorized and required to ascertain, set aside, and reserve from allotment to the individual members of the said tribes of Indians lands principally valuable because of their deposits of coal or asphalt, and that pursuant to such provision upon March 25th, 1903, the Secretary of the Interior did so reserve certain lands lying within the domain of the Choctaw and Chickasaw Nations of Indians in the Indian Territory, now Oklahoma, as segregated coal and asphalt lands of the said tribes of Indians. That the lands and realty hereinafter more particularly mentioned and described are a portion of the lands so segregated, set aside, and reserved, and are located within Pittsburg County, in the State of Oklahoma.

That the McAlester-Edwards Coal Company is the owner and in possession of coal mining leases executed under and by virtue of an act of Congress approved June 28th, 1898 (30 Stats. 495), which lease was dated July 3rd, 1899, and duly assigned to the McAlester-Edwards Coal Company, and which assignment was approved by the Secretary of the Interior on May 2nd, 1906.

A full, true, correct, and complete copy of the said leases is hereunto attached, marked for its identification Exhibit "A," and it is respectfully prayed that the same be taken and considered a part hereof in the same manner and with like effect as if set forth in full herein; and it is respectfully shown that the realty hereinafter particularly mentioned and described is a portion of the lands covered by the said lease.

That under the authority of the provisions of the act of Congress approved March 4th, 1913 (Public 437) entitled "An act authorizing the Secretary of the Interior to lease to the operators of coal mines in Oklahoma additional acreage from the unleased segregated coal land of the Choctaw and Chickasaw Nations," on Aug. 13", 1914, the said Choctaw and Chickasaw Nations entered into a certain coal-mining lease with said McAlester-Edwards Coal Company, which said lease thereafter upon ——, was approved by the Secretary of the Interior of the United States. A full, true, correct, and complete copy of the said lease is hereunto attached, marked for its identification Exhibit "B," and it is respectfully prayed that the same be taken and considered a part hereof in the same manner and with like effect as if set forth in full herein; and it is respectfully shown that the realty hereinafter particularly mentioned and described is a portion of the lands covered by the said lease.

That by the act of Congress approved February 19th, 1912 (Public No. 91), entitled "An act to provide for the sale of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes," it is provided that the Secretary of the Interior is authorized to sell the surface, leased and unleased, of the said lands of the Choctaw and Chickasaw Nations in Oklahoma segregated and reserved by order of the Secretary of the Interior dated March 24th, 1903, under the authority of the said act of Congress approved July 1st, 1902, the surface so authorized to be sold including the entire estate in said lands, save the coal and asphalt reserved; and by the said act of February 19th, 1912, it is required that the Secretary of the Interior shall classify and appraise the said surface so to be sold. That by the said Act of February 19th, 1912, it is further provided as follows:

" SEC. 2. That after such classification and appraisement has
4 been made each holder of a coal or asphalt lease shall have a right for 60 days, after notice in writing, to purchas- at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up to 5 per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be approved by the Secretary of the Interior; provided, that the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lessee to not more than 10 per centum of the surface; provided further, that such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved; provided futher, that if any lessee shall fail to apply to purchase under the providions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and

reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved."

That pursuant to the said act the Secretary of the Interior classified and appraised the surface of the said segregated coal and asphalt lands of the said nations, including the surface of the lands held by said McAlester-Edwards Coal Company under said leases; that said McAlester-Edwards Coal Company elected not to purchase under the provisions of section 2 of said act hereinabove quoted and failed to apply for purchase under the said provisions, although said McAlester-Edwards Coal Company was the owner of the said coal-mining leases at the time of the completion of such classification and appraisement. That said McAlester-Edwards Coal Company, by virtue of its said mining leases had and was entitled to the free occupancy of the surface of all of the lands covered by said leases for its proper use and enjoyment for the purpose of the exercise of its rights and privileges under the said leases; that said McAlester-Edwards Coal Company having failed to purchase five per centum of the surface of its leased lands pursuant to said section 2 of the said act of February 19th, 1912, the Secretary of the Interior thereupon entered into an agreement with said McAlester-Edwards Coal Company whereby the Secretary of the Interior, with the consent of the McAlester-Edwards Coal Company, designated and reserved from sale as proper and necessary to embrace improvements actually used in present mining operations or necessary for future operations under its said existing leases all of the lands hereinafter mentioned and concerned in this action, namely:

Description of Surface Reserved by the McAlester-Edwards Coal Company and the Appraised Value Thereof under the Act of February 19th, 1912.

Tract No.	Description.	Acres.	Price.	Imp.	Amt.
817	N. W. ¼ S. E. ¼ Sec. 16–3 N.–14 E	40	8. 50	--	340. 00
	Lot 9 Pittsburg T. S. Addn. #23	20. 01	....	--	350. 00
	" 10 " " " "	20	....	--	300. 00
	" 11 " " " "	9. 99	....	--	200. 00
	" 14 " " " "	10	....	--	150. 00
	S. W. ¼ S. E. ¼ Sec. 24, 3 N.–13 E	40. 13	....	51	200. 00
	Kiowa T. S. #22	.....	....	52	175. 00
	Tracts 51–52–65–66	.....	....	65	150. 00
				66	150. 00
Kiowa T. S.	#22 T. R. 67, S. W. ¼ S. E. ¼ S. E. ¼ 24–3 N.–13 E	10. 05	....	67	150. 00
765	E. ½ N. E. ¼ Sec. 25, 3 N.–13 E	75. 99	10. 05	--	759. 90
825	S. ½ S. E. ¼ Sec. 17, 3 N.–14 E	20	10. 00	--	200. 00
817	N. E. ¼ S. W. ¼ Sec. 16, 3 N.–14 E	40	8. 50	--	340. 00
817	N. ½ S. E. ¼ S. W. ¼ Sec. 16, 3 N.–14 E	20	8. 50	--	170. 00
817	N. ½ S. ½ S. E. ¼ S. W. ¼ Sec. 16, 3 N.–14 E	10	8. 50	--	85. 00
	Improvements on 817	.....	....	" C "	250. 00
815	E. ½ S. W. ¼ S. W. ¼ Sec. 16, 3 N.–14 E	20	10. 00	--	200. 00
815	S. W. ¼ S. W. ¼ S. W. ¼ Sec. 16, 3 N.–14 E	10	10. 00	--	100. 00
824	S. ½ S. ½ S. W. ¼ S. E. ¼ 17, 3–14	10	10. 00	--	100. 00
	Lot #1, Pittsburgh T. S. Addn. 24	22. 50	....	--	275. 00
	Lot #2, " " " "	20. 99	....	--	225. 00
	Lot #3, " " " "	17. 39	....	--	275. 00
	Lot #12, " " " "	7. 49	....	--	150. 00
	Lot 13, " " " "	7. 57	....	--	150. 00
	Lot 14, " " " "	4. 98	....	--	100. 00
	Lot 15, " " " "	4. 98	....	--	100. 00
	Lot 16, " " " "	5	....	--	100. 00
	Lot 17, " " " "	7. 60	....	--	150. 00

Description of Surface Reserved by the McAlester-Edwards Coal Company and the Appraised Value Thereof under the Act of February 19th, 1912—Continued.

Tract No.	Description.	Acres.	Price.	Imp.	Amt.
824	Lot 18, Pittsburgh T. S. Addn. 24	4.98	....	..	125.00
	Lot 19, " " "	5	....	..	125.00
	Lot 20, " " "	4.98	....	..	125.00
	Lot 21, " " "	7.69	....	..	200.00
	Lot 22, " " "	1.05	....	..	25.00
	Lot 23, " " "	9.69	....	..	150.00
	Lot 24, " " "	10	....	..	160.00
	Lot 25, " " "	10	....	..	175.00
	Lot 26, " " "	13.79	....	..	240.00
	Lot 27, " " "	5.38	16.50	..	88.80
	Lot 28, " " "	10.00	....	..	150.00
	Lot #8, Pittsburg T. S. Addn. 24	10.86	....	..	220.00
	Lot #9, " " "	9.09	....	..	180.00
	Lot 11, " " "	9.26	....	..	185.00
	Lot 31, " " "	5	....	..	125.00
	Lot 32, " " "	4.98	....	..	125.00
	Lot 33, " " "	5	....	..	125.00
	Lot 34, " " "	4.98	....	..	125.00
	Lot 35, " " "	4.98	....	..	150.00
	Lot 36, " " "	5	....	..	150.00
	Lot 37, " " "	4.98	....	..	150.00
	Lot 38, " " "	5	....	..	125.00
	Lot 30, " " 23	2.50	....	..	50.00
	Lot 31, " " "	4.10	....	..	80.00
	Lot 32, " " "	14.66	....	..	150.00
	Lot 33, " " "	2.53	....	..	35.00
					9 433.70

7 That as consideration for such agreement upon the part of the Secretary of the Interior, said McAlester-Edwards Coal Company consented and agreed that the Secretary of the Interior at all times acting for and in the behalf of the Choctaw and Chickasaw Nations, might dispose of the remaining portion of the surface within the said leases of the McAlester-Edwards Coal Company free and clear of any claim by said lessee, except as by the said act of February 19th, 1912, provided. That there is hereunto attached, marked for its identification Exhibit "C," a full, true, correct and complete copy of the resolution of the board of directors of McAlester-Edwards Coal Company agreeing to the reservation of the lands hereinabove described and relinquishing the rights of said McAlester-Edwards Coal Company in the remaining surface of its said leases, which it is prayed shall be considered and held to be a part hereof in the same manner and with like effect as if set forth in full herein.

That by the act of Congress approved February 8th, 1918, (Public 98) entitled "An act providing for the sale of the coal and asphalt deposits in the segregated mineral land in the Choctaw and Chickasaw Nations, Oklahoma," the Secretary of the Interior is authorized to sell the segregated coal and asphalt mineral deposits of the Choctaw and Chickasaw Nations in Oklahoma, and is required, before offering the same for sale, to cause the same to be appraised. That said McAlester-Edwards Coal Company purchased all the coal under the first leases herein described, marked Exhibit "A," at the first sale when said coal was offered for sale under said act last above referred to, and paying therefor the sum of $83,319.32. And by the said act it is further provided as follows:

"That any lessee shall have the preferential right, provided the same is exercised within 90 days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him heretofore reserved by order of the Secretary of the Interior."

That pursuant to the provision of the said act of Congress approved February 8th, 1918, the Department of the Interior of the United States within 90 days after the approval of the completion of the appraisement of minerals as in said act provided, notified the said McAlester-Edwards Coal Company of the appraisement of its said reserved surface and of the price required to be paid by it for such purchase, and that within such period of 90 days specified by the said act of February 8th, 1918, said McAlester-Edwards Coal Company on November 6th, 1918, within the time and in the manner by law provided exercised its preferential right to purchase granted by the said act, and in fact did purchase from the Choctaw the first payment, $2,291.76, which was accepted by Gabe E. Parker, Superintendent of the Five Civilized Tribes at Muskogee,

8 Oklahoma; and that within the time and in the manner prescribed by the Department of the Interior of the United States made such payment of the purchase price as were by the department prescribed and required; and that upon October 15th, 1920, said McAlester-Edwards Coal Company tendered to the Choctaw and Chickasaw Nations of Indians and to the Department of the Interior of the United States for the said nations, the whole of the purchase price of such reserved surface amounting to the sum of $10,360.06; and that at all times since October 15th, 1920, said McAlester-Edwards Coal Company has been and is the equitable owner of the said surface, and all of the same, and has been and is entitled to patent conveying to said McAlester-Edwards Coal Company all of the right, title, estate, and interest of the Choctaw and Chickasaw Nations of Indians in and to the lands hereinabove particularly described, save and except the coal and asphalt therein.

That despite such tender of purchase price and despite such right and ownership upon the part of said McAlester-Edwards Coal Company the respondents herein have refused to accept the purchase price so tendered and have refused to deliver to the said McAlester-Edwards Coal Company patent evidencing its title to the said realty and do still wholly fail and refuse so to do, although it is the administrative duty of the respondents under the plain and unambiguous provisions of the laws of the United States above referred to accept and receive the said purchase price and cause to be issued and delivered to McAlester-Edwards Coal Company patents evidencing its title to the said realty.

That said McAlester-Edwards Coal Company at all times has stood and does stand ready to make payments of such purchase price, and does here and now continue and renew its tender thereof, demanding that such purchase price be accepted, and that patents be issued and delivered to it in accordance with its rights hereinabove asserted.

That relator is without remedy in the premises, unless a remedy be accorded by the mandate of this honorable court, and that unless such remedy be granted, adjudged, and made effectual the title and rights of relator will continue indefinitely to be clouded and the record and evidence thereof will continue to be incomplete; and that by reason of the matters and things hereinabove set forth relator is entitled to remedy at the hands of this honorable court as hereinafter prayed for.

Wherefore, the premises considered your petitioner prays:

I. That a writ of mandamus may be issued and directed to the respondents John Barton Payne, Douglas H. Johnston, and William F. Semple commanding them to accept the tender of purchase price heretofore and now made by McAlester-Edwards Coal Company, and to deliver or cause to be delivered to McAlester-Edwards Coal Company patent evidencing the sale and effecting the conveyance to McAlester-Edwards Coal Company of all of the right, title, estate, and interest of the Choctaw and Chickasaw Nations of Indians, ex-

cept the coal and asphalt reserved, in and to the realty here-
9 inabove particularly described, subject only to the limitations and exceptions provided by the said act of February 8th, 1918, and the said act of February 19th, 1912; and,

II. For such other right or rights, relief or order as to the court may seem proper and the nature of petitioner's case may require.

To which end petitioner prays that a rule may issue requiring respondents and each of them to show cause, if any they have, why the writ of mandamus should not issue herein as prayed.

McALESTER-EDWARDS COAL COMPANY, [SEAL.]
By E. S. REA,
President.
FULLER, PORTER & FULLER,
of McAlester, Oklahoma;
JAMES W. BELLER &
CONRAD H. SYME,
Attorneys for Petitioner.

Attest:
M. E. WILLIAMS,
Secretary.

STATE OF KANSAS,
County of Montgomery, ss:

Before me, H. H. Smith, a notary public within and for Montgomery county, Kansas, at my office in said State and county, personally appeared E. S. Rea, who being by me first duly sworn, on oath that he is the president of McAlester-Edwards Coal Company, the relator corporation named in the foregoing petition; that he has read the foregoing petition by him subscribed as such president, and knows the contents thereof; that the statements of fact therein made as upon personal knowledge are true, and those made upon information and belief he believes to be true.

Subscribed and sworn to before me this 29th day of Nov., A. D. 1920.

H. H. SMITH, [SEAL.]
Notary Public.

My commission expires 3/31/21.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 2, 1906.

The assignment of this lease to the McAlester-Edwards Coal Company is hereby approved.

(Signed) THOS. RYAN,
First Assistant Secretary.
E. R. S.

10 No. 322. Received Sept. 1, 1899. Office of U. S. Ind. Ins. for Indian Territory.

Indian Territory mining lease.

(Choctaw and Chickasaw Nations.)

Indenture of lease made and entered into in quadruplicate on this third day of July, A. D. 1899, by and between Napolean B. Ainsworth and Lenniel C. Burris, as mining trustees of the Choctaw and Chickasaw Nation, parties of the first part, and Daniel Edwards and Thomas D. Edwards, trading as D. Edwards and Son, of McAlester, Choctaw Nation, Indian Territory, parties of the second part, under and in pursuance of the provisions of the act of Congress approved June 28th, 1898 (30 Stats. 495), the agreement set out in section twenty-nine thereof duly ratified on August 24th, 1898, and the rules and regulations prescribed by the Secretary of the Interior on October 7, 1898, relative to mining leases in the Choctaw and Chickasaw Nations.

Now, therefore, this indenture witnesseth, That the party of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the parties of the second part, their executors, administrators, or assigns, does hereby demise, grant, and let unto the parties of the second part, their executors, administrators, or assigns, the following-described tract of land, lying and being within the Choctaw Nations, and within the Indian Territory, to wit: The east half (E. ½) of section twenty-four (sec. 24) of township three north (Tp. 3 N.) of range thirteen east (R–13–E) and all of section nineteen (19) of township three north of range fourteen east of the Indian meridian, and containing nine hundred & sixty acres, more or less, for the full term of thirty (30) years from date hereof for the sole purpose of prospecting for the mining coal. A map of said lease is attached hereto and made a part of this lease for a more definite description of same.

In consideration of the premises the parties of the second part hereby agree and bind themselves, their executors, administrators, or assigns, to pay or cause to be paid to the United States Indian agent for Union Agency, Indian Territory, as royalty, the sum of money as follows, to wit:

On the production of all coal mines developed and operated under this lease the sum of ten (10) cents per ton for each and every ton of coal produced, passing over a one-inch screen.

On asphaltum the sum of — cents per ton for each and every ton produced.

On oil the sum of — per centum of the value of all oil produced.

On all other minerals, such as gold, silver, iron, and the like, as follows (sampling charges to be first deducted): On all net smelter returns of ore over fifty ($50) dollars per ton and under, a royalty of ten (10) per cent; on all net smelter returns of ore over

11 fifty ($50) dollars per ton and less than one hundred and fifty ($150) dollars per ton, a royalty of fifteen (15) per cent; on all net smelter returns of ore over one hundred and fifty ($150) dollars per ton and less than three hundred ($300) dollars per ton, a royalty of twenty (20) per cent, and all net smelter returns of ore over three hundred ($300) dollars per ton, a royalty of twenty-five (25) per cent.

And all said royalties accruing for any month shall be due and payable on or before the 25th day of the month succeeding.

And the parties of the second part further agree, and bind themselves, their executors, administrators, or assigns to pay or cause to be paid to the United States Indian agent for the Union Agency, Indian Territory, as advanced royalty on each and every mine or claim within the tract of land covered by this leases the sums of money as follows, to wit: One hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars per annum, in advance, for the fifth and each succeeding year thereafter, of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be credited on royalty should the parties of the second part develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceed such sums paid as advanced royalty as above set forth, and, further, that should the parties of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable under this lease then this lease shall be null and void, and all royalties paid in advance shall become the money and property of the Choctaw and Chickasaw Tribes of Indians, subject to the regulations of the Secretary of the Interior aforesaid.

The parties of the second part further covenant, and agree, to exercise diligence in the conduct of the prospecting and mining operations, and to open mines or sink wells for oil, and operate same in a workmanlike manner to the fullest possible extent on the above-described tract of land; to commit no waste upon said land or upon the mines that may be thereon, and to suffer no waste to be committed thereon; to take good care of the same, and to surrender and return the premises at the expiration of this lease to the parties of the first part in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by the said D. Edwards and Son, the parties of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other consideration herein specified—except engines, tools, and machinery, which shall remain the property of the said parties of the second part; that they will not permit any nuisance to be maintained on

the *the* premises, nor allow any intoxicating liquors to be sold or given away to be used for any purposes on the premises, and that they will not use the premises for any other purpose than that
12 authorized in this lease, nor allow them to be used for any other purpose; that they will not at any time during the term hereby granted assign or transfer their estate, interest, or term in said premises and land or the appurtenances thereto to any person or persons whomsoever without the written consent thereto of the parties of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said parties of the second part further covenant, and agree, that they will keep an accurate account of all mining operations, showing the whole amount of mineral mined or removed, and that there shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all such minerals, metals, and substances obtained from the land herein leased, as security for the monthly payment of said royalties.

And the parties of the second part agree that this indenture of lease shall be subject in all respects to the rules and regulations heretofore or that may be hereafter prescribed, under the said act of June 28th, 1898, by the Secretary of the Interior relative to mineral leases in the Choctaw and Chickasaw Nations; and, further, that should the parties of the second part, their executors, administrators, or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of thirty days to pay the stipulated monthly royalties provided for therein, then the Secretary of the Interior shall be at liberty, in his descretion, to avoid this indenture of leases, and cause the same to be annulled, when all the rights, franchises, and privileges of the parties of the second part, their executors, administrators, or assigns, hereunder shall cease and end, without further proceedings.

The parties of the second part are firmly bound for the faithful compliance with the stipulations of this indenture by and under the bond made and executed by the parties of the second part as principals, and the Fidelity and Deposit Company of Maryland, as surety, entered into the third day of July, A. D. 1899, and which is on file in the Indian Office.

13 In witness whereof, the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above mentioned.

Witnesses:

HAMPTON TUCKER,
McAlester, I. T., as to

NAPOLEON B. AINSWORTH, [SEAL.]
Trustee for Choctaw Nation.

JESSE L. SCHULTZ,
Wilburton, I. T., as to

LEMUEL C. BURRIS, [SEAL.]
Trustee for Chickasaw Nation.

SAMUEL GUERRIER,
So. McAlester, I. T.,
DUNCAN M. McPHIE,
McAlester, I. T., as to
D. EDWARDS & SON, [SEAL.]
By DANIEL EDWARDS.
SAMUAL GUERRIER,
DUNCAN M. MACPHIE, as to
DANIEL EDWARDS. [SEAL.]
SAMUAL GUERRIER,
HAMPTON TUCKER,
McAlester, I. T., as to
THOMAS D. EDWARDS. [SEAL.]

(Endorsed: 4031. Indian office 2 Duplicate File No. 39. No. 1, Department of Interior, Washington, D. C. Mineral lease. Napoleon B. Ainsworth, Lemuel C. Burris, mining trustees, c/o D. Edwards & Son, of McAlester, I. T. Dated July 3" 1899. 1799. Muskogee, I. T., July 2, 1899. Department Interior. Rec'd July 29" 1899. Int. Ter. Div. No. 2146.

EXHIBIT "A" 2.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 2, 1906.

The assignment of this lease to The McAlester Edwards Coal Company is hereby approved.

(Signed) THOS. RYAN,
First Assistant Secretary.
E. R. S.

No. 322. Received Sept. 1, 1899. Office of U. S. Ind. Ins. for Indian Territory.

14 *Indian Territory mining lease.*

(Choctaw and Chickasaw Nations.)

Indenture of lease, made and entered into in quadruplicate, on this third day of July, A. D. 1899, by and between Napoleon B. Ainsworth and Lenniel C. Burris as mining trustees of the Choctaw and Chickasaw Nation, parties of the first part, and Daniel Edwards and Thomas D. Edwards trading as D. Edwards and Son of McAlester Choctaw Nation, Indian Territory parties of the second part, under and in pursuance of the provisions of the act of Congress approved June 28th, 1898 (30 Stats., 495), the agreement set out in section twenty-nine thereof duly ratified on August 24th, 1898, and the rules and regulations prescribed by the Secretary of the Interior on October 7, 1898, relative to mining leases in the Choctaw and Chickasaw Nations.

Now, therefore, this indenture witnesseth, That the party of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the parties of the second part, their executors, administrators, or assigns, does hereby demise, grant, and let unto the parties of the second part, their executors, administrators, or assigns, the following-described tract of land, lying and being within the Choctaw Nations, and within the Indian Territory, to wit: The southwest quarter (S. W. ¼) and the north half of the southeast quarter (N. ½ of S. E. ¼) of section sixteen (16); south half of section seventeen (17); north half of section twenty (20); north half of northwest quarter (N. ½ of N. W. ¼) of section twenty-one (21), of township three north (Tp. 3 N.) of range fourteen east (R–14–E) of the Indian meridian, and containing nine hundred and sixty acres, more or less, for the full term of thirty (30) years from date hereof for the sole purpose of prospecting for mining coal. A map of said lease is attached hereto and made a part of this lease for a more definite description of same.

In consideration of the premises the parties of the second part hereby agree, and bind themselves, their executors, administrators, or assigns, to pay or cause to be paid to the United States Indian agent for Union Agency, Indian Territory, as royalty, the sum of money as follows, to wit:

On the production of all coal mines developed and operated under this lease the sum of ten (10) cents per ton for each and every ton of coal produced, passing over a one-inch screen.

On asphaltum the sum of — cents per ton for each and every ton produced.

On oil the sum of — per centum of the value of all oil produced.

On all other minerals, such as gold, silver, iron, and the like, as follows (sampling charges to be first deducted): On all net smelter returns of ore over fifty ($50) per ton and under, a royalty of ten (10) per cent; on all net smelter returns of ore over fifty ($50) dollars per ton and less than one hundred and fifty ($150) dollars per ton, a royalty of fifteen (15) per cent; on all net smelter returns of ore over one hundred and fifty ($150) dollars per ton and less than three hundred ($300) dollars per ton, a royalty of twenty (20) per cent, and all net smelter returns of ore over three hundred ($300) dollars per ton, a royalty of twenty-five (25) per cent.

And all said royalties accruing for any month shall be due and payable on or before the 25th day of the month succeeding.

And the parties of the second part further agree, and bind themselves, their executors, administrators, or assigns to pay or cause to be paid to the United States Indian agent for the Union Agency, Indian Territory, as advanced royalty on each and every mine or claim within the tract of land covered by this lease the sum of money as follows, to wit: One hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum

in advance for the third and fourth years; and five hundred dollars per annum, in advance, for the fifth and each succeeding year thereafter, of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be credited on royalty should the parties of the second part develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceed such sums paid as advanced royalty as above set forth, and further, that should the parties of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable under this lease then this lease shall be null and void, and all royalties paid in advance shall become the money and property of the Choctaw and Chickasaw Tribes of Indians, subject to the regulations of the Secretary of the Interior aforesaid.

The parties of the second part further covenant, and agree, to exercise diligence in the conduct of the prospecting and mining operations, and to open mines or sink wells for oil, and operate same in a workmanlike manner to the fullest possible extent on the above described tract of land; to commit no waste upon said land or upon the mines that may be thereon, and to suffer no waste to be committed thereon; to take good care of the same, and to surrender and return the premises at the expiration of this lease to the parties of the first part in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by the said D. Edwards and Son, the parties of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other consideration herein specified—except engines, tools, and machinery, which shall remain the property of the said parties of the second part; that they will not permit any nuisance to be maintained on the premises, nor
16 allow any intoxicating liquors to be sold or given away to be used for any purposes on the premises, and that they will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that they will not at any time during the term hereby granted, assign or transfer their estate, interest, or term in said premises and land or the appurtenances thereto to any person or persons whomsoever without the written consent thereto of the parties of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said parties of the second part further covenant, and agree, that they will keep an accurate account of all mining operations, showing the whole amount of mineral, mined or removed, and that there shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining

operations, and upon all such minerals, metals, and substances obtained from the land herein leased, as security for the monthly payment of said royalties.

And the parties of the second part agree, that this indenture of lease shall be subject in all respects to the rules and regulations heretofore or that may be hereafter prescribed, under the said act of June 28, 1898, by the Secretary of the Interior relative to mineral leases in the Choctaw and Chickasaw Nations; and further, that should the parties of the second part, their executors, administrators, or assigns, violate any of the covenents, stipulations, or provisions of this lease, or fail for the period of thirty days to pay the stipulated monthly royalties provided for herein, then the Secretary of the Interior shall be at liberty, in his descretion, to avoid this indenture of leases, and cause the same to be annulled, when all the rights, franchises, and privileges of the parties of the second part, their executors, administrators, or assigns, hereunder shall cease and end, without further proceedings.

The parties of the second part are firmly bound for the faithful compliance with the stipulations of this indenture by and under the bond made and executed by the parties of the second part as principals, and the Fidelity and Deposit Company of Maryland, as surety entered into the third day of July, A. D. 1899, and which is on file in the Indian Office.

17 In witness whereof, the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above mentioned.

Witnesses:

HAMPTON TUCKER,
McAlester, I. T., as to
NAPOLEON B. AINSWORTH, [SEAL.]
Trustee for Choctaw Nation.

JESSE L. SCHULTZ,
Wilburton, I. T., as to
LEMUAL C. BURRIS, [SEAL]
Trustee for Chickasaw Nation.

SAMUEL GUERRIER,
So. McAlester, I. T.,
DUNCAN M. MACPHI, as to
McAlester, I. T., as to
D. EDWARDS & SON, [SEAL.]
By DANIEL EDWARDS.

SAMUEL GUERRIER,
DUNCAN M. MCPHIE, as to
DANIEL EDWARDS. [SEAL.]

SAMUAL GUERRIER,
HAMPTON TUCKER,
McAlester, I. T., as to
THOMAS D. EDWARDS. [SEAL.]

EXH. "B."

Whereas Napoleon B. Ainsworth and Lemual C. Burrin, mining trustees of the Choctaw and Chickasaw Nations, Oklahoma (formerly Indian Territory), parties of the second part, acting under section 29 of the act of Congress approved June 28, 1898 (30 Stat. 495), entered into certain leases, dated the 3rd day of July, A. D. 1899, for the purpose of prospecting for and mining coal, which leases cover the following described tracts of land, situate in Pittsburg County, State of Oklahoma, to wit:

Lease No. 1.

The east half of section twenty-four (24), township three north (3), range thirteen (13) east, and all of section nineteen (19), township three north, range fourteen (14) east.

18 Lease No. 2.

The north half of section twenty (20); the south half of section seventeen (17); the southwest quarter and the north half of the southeast quarter of section sixteen (16); and the north half of the northwest quarter of section twenty-one (21); all in township three (3) north, range fourteen (14) east:

Whereas on March 10, 1906, Harriet Edwards and Thomas D. Edwards, sole surviving partners of the above-mentioned firm of D. Edwards & Son, sold, transferred, assigned, and conveyed all their estate, interest, and term in the above-described premises and land, and the appurtenances thereunto belonging, with all rights and privileges accruing to them under the terms of the above-described leases, to The McAlester-Edwards Coal Company, a corporation, organized under the laws of Indian Territory and now existing under the lows of the State of Oklahoma, which said sale, transfer, and assignment was duly approved by Thos. Ryan, First Assistant Secretary of the Interior, on May 2, 1906, and

Whereas by act of Congress approved March 4, 1913, entitled "An act authorizing the Secretary of the Interior to lease to the operators of coal mines in Oklahoma additional acreage from the unleased segregated coal land of the Choctaw and Chickasaw Nations" (Public, No. 437) provision is made whereby the Secretary of the Interior, under rules and regulations to be prescribed by him, may grant to the operator of any coal mine or mines in the State of Oklahoma the right to lease additional acreage from the unleased segregated coal land of the Choctaw and Chickasaw Nations, in the State of Oklahoma, not to exceed in any case six hundred forty acres of land, which additional lands shall adjoin and be continuous to the coal-mining property of the applicant in operations, and must be necessary for the successful administration of such mine or mines;

Provided, that the lease or leases on such additional coal lands shall not be made for a longer period of time than existing leases of the respective applicants and shall not be made at a less rate of royalty than the rate of royalty paid on existing leases now in operation in said State of Oklahoma; and

Whereas said The McAlester-Edwards Coal Company is a coal mining corporation in good faith actually operating coal mines on its existing coal leases in the Choctaw Nation, State of Oklahoma, and desired to avail itself of the provisions of the said act of Congress of March 4, 1918, and to add to its said existing coal leases certain additional lands from the unleased segregated coal lands in said Nation and State, which additional lands adjoin and are contiguous to the coal-mining properties of said The McAlester-Edwards Coal Company in operation and are necessary for the successful operations and administration of such coal-mining properties.

Now, therefore, the undersigned the mining trustees of the Choctaw and Chickasaw Nations of McAlester, Oklahoma, and the McAlester-Edwards Coal Company hereby jointly and severally agree and consent, subject to the approval of the Secretary of the
19 Interior, that the following described tracts of the unleased segregated coal lands of the Choctaw and Chickasaw Nations, aggregating 480 acres, more or less, be and the same are hereby added to and made a part of the existing coal-mining lease No. 1 of said The McAlester-Edwards Coal Company, to wit:

The northeast quarter and the east half of the northwest quarter of section twenty-five (25); the east half of the southwest quarter of section twenty-four (24); all in township three (3) north, range thirteen (13) east; the northwest quarter of the northwest quarter of section thirty (30); the south half of the southeast quarter, and the southeast quarter of the southwest quarter of section eighteen (18); all in township three (3) north, range fourteen (14) east:

And that the following described tracts of unleased segregated coal lands of the Choctaw and Chickasaw Nations, aggregating 160 acres, more or less, be and the same are hereby added to and made a part of the existing coal mining lease No. 2, of said The McAlester Coal Company, to-wit:

The southwest quarter of the northwest quarter of section fifteen (15); the south half of the northeast quarter, and the southeast quarter of the northwest quarter of section sixteen (16); all in township three (3) north, range fourteen (14) east.

The said The McAlester-Edwards Coal Company for itself, its successors, and assigns, expressly agree that all the covenants, stipula and provisions of its existing coal mining leases shall continue in full force and effect and shall apply to said additional acreage hereby added to said existing leases, and that said additional acreage shall be subject in all respects to the rules and regulations approved May 22, 1900, as amended December 6, 1907, prescribed under the act of June 28, 1898 (30 Stat. 495), and the regulations

approved June 18, 1913, prescribed under the act of March 4, 1913 (Public, No. 437), and regulations that may hereafter be prescribed under said acts of June 28, 1898, and March 4, 1913, by the Secretary of the Interior relative to coal mining leases in the Choctaw and Chickasaw Nations, State of Oklahoma; and further expressly agrees that the lease of the McAlester-Edwards Coal Company on said additional area shall terminate July 2, 1929, the same date that the existing leases terminate, and that the rate of royalty on coal mines, applicable to said additional area, shall be eight (8) cents per ton of 2,000 pounds, on mine run, or coal as it is taken from the mine, including that which is commonly called slack, being the same royalty provided by the existing leases, and all said royalties accruing for any month shall be due and payable on or before the 25th day of the month succeeding; and further expressly agrees to pay to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, or such other officer as may be designated by the Secretary of the Interior, any additional rate of royalty on said additional acreage that may be prescribed by the Secretary of the Interior during the remainder of the term of the said lease as hereby amended.

The McAlester-Edwards Coal Company as successor to the
20 hereinabove mentioned copartnership of D. Edwards & Son, is bound for the faithful performance of the covenants and stipulations of the agreement and the said coal leases above described by and under a bond in the sum of fifty thousand dollars ($50,000), made and executed by the said copartnership of D. Edwards & Son as principals, and Fidelity and Deposit Company of Maryland, as surety, entered into on July 3, 1899, and which is on file in the Indian Office at Washington, D. C., said Fidelity and Deposit Company of Maryland as *m*uch surety having consented to the assignment of said leases to The McAlester-Edwards Coal Company of the additional land above described, to its said existing leases, and has agreed that the said bond shall remain in full force and effect in the same manner and to the same extent as if the said 640 acres additional, above described, had been included in the original lease.

In witness whereof, the mining trustees of the Choctaw and Chickasaw Nations have hereunto set their hands and The McAlester-Edwards Coal Company has caused its corporate name to be subscribed by its President, attested by its Secretary, and its corporate seal thereto affixed this 13th day of August, 1914.

WILLIAM R. MCINTOSH,
Mining Trustee for Choctaw Nation.

Witnesses:
T. B. LATHAM,
HAMPTON TUCKER,
Both witnesses of McAlester, Okla.

HAMP WILLIS,
Mining Trustee for Chickasaw Nation.

Witnesses:
T. B. LATHAM,
HAMPTON TUCKER,
Both witnesses of McAlester, Okla.

THE MCALESTER-EDWARDS COAL CO.,
By E. S. REA,
President.

Witnesses:
L. J. MORGAN,
A. E. WILSON,
Both witnesses of Coffeyville, Kansas.

Attest:
M. E. WILLIAMS,
Secretary.

Witnesses:
M. CRUTCHER,
FRANCIS L. DREW,
Both witnesses of McAlester, Okla.

21 Whereas the mining trustees of the Choctaw and Chickasaw Nations and the McAlester-Edwards Coal Company, a corporation, acting under the act of March 4, 1913, and the rules and regulations prescribed thereunder by the Secretary of the Interior on June 18, 1913, entered into an agreement on the 13th day of August, 1914, subject to the approval of the Secretary of the Interior, whereby certain tracts of the unleased segregated coal lands of the Choctaw and Chickasaw Nations, aggregating 640 acres, are added to and made a part of the existing coal mining leases Nos. 1 and 2 of the said The McAlester-Edwards Coal Company, the said tracts being situated in Pittsburg County, State of Oklahoma, and described as follows, to-wit:

The northeast quarter, and the east half of the northwest quarter of section twenty-five (25); the east half of the southwest quarter of section twenty-four (24); all in township three (3) north, range thirteen (13) east; the southwest quarter of the northwest quarter of section fifteen (15); the southeast quarter of the northeast quarter and the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, of section sixteen (16); and the south half of the southeast quarter, and the southeast quarter of the southwest quarter, of section eighteen (18); and the northwest quarter of the northwest quarter of section thirty (30); all in township three (3) north, range fourteen (14) east.

Now, therefore, The Fidelity and Deposit Coal Company of Maryland, security for the McAlester-Edwards Coal Company on the bonds accompanying the coal mining leases above described, hereby consents to the McAlester-Edwards Coal Company adding to and making part of their said existing coal leases Nos. 1 and 2, subject to the approval of the Secretary of the Interior, the tracts of the unleased segregated coal lands of the Choctaw and Chickasaw Nations and the McAlester-Edwards Coal Company, whereby said tracts of

the unleased segregated coal lands are added to and made a part of the said existing coal leases and agrees that the said bond shall remain in full force and effect and in the same manner and to the same effect as if said additional 640 acres had been included in the original leases above described.

22 In witness whereof, The Fidelity and Deposit Company of Maryland has caused its corporate name to be subscribed by its president, attested by its secretary, and its corporate seal hereto affixed, this 13th day of August, 1914, in quintriplicate.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By GEORGE L. RODEUFFE,
Vice President.

Witnesses:
JAMES J. HOLDEN,
CHARLES YALE, Jr.,
Both Witnesses of Ellicott City, Md.

Attest:
F. A. BACH,
Asst. Secretary.

Witnesses:
JAMES J. HOLDEN,
CHARLES YALE, Jr.,
Both Witnesses of Ellicott City, Md.

Extracts from the Minute Book of the Board of Directors of the McAlester-Edwards Coal Company.

"A meeting of the board of directors of the McAlester-Edwards Coal Company was held at its office on the 10th day of August, 1914.

"The following resolution was duly adopted:

"*Resolved*, That it is the desire and for the best interest of the company that it take advantage of the provisions of the act of Congress approved March 4, 1913, and acquire additional acreage of the unleased segregated coal lands of the Choctaw and Chickasaw Nations adjoining and contiguous to its existing leases Nos. 1 and 2 in Pittsburg County, State of Oklahoma:

"Wherefore, the president, or vice president, and the secretary, or assistant secretary, be and are hereby authorized and directed to enter into a contract with the mining trustees of the Choctaw and Chickasaw Nations, whereby the following described tracts situated in Pittsburg County, State of Oklahoma, shall be added to and become a part of the existing leases of this company, to-wit:

"The northeast quarter, and the east half of the northwest quarter, of section twenty-five (25); the east half of the northwest quarter of section twenty-four (24), all in township three (3) north, range thirteen (13) east; the southwest quarter of the northwest quarter of section fifteen (15); the southeast quarter of the northeast quarter and the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, of section sixteen (16); and the south half of the southeast quarter, and the southeast quarter of

the southwest quarter, of section eighteen (18); and the northwest quarter of the northwest quarter of section thirty (30); all in township three (3) north, range fourteen (14) east."

23 STATE OF OKLAHOMA,
County of Pittsburg, ss:

I, M. E. Williams, secretary of The McAlester-Edwards Coal Company, do hereby certify that I have compared the foregoing extracts and transcripts from the minute book of the board of directors of the McAlester-Edwards Coal Company with the original minute book, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said minute book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in said minute book, and do certify that the same is correct and true transcript therefrom, and of the whole of said resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of said company this 11th day of August, 1914.

M. E. WILLIAMS, *Secretary.*

EXHIBIT "C."

Resolution.

Adopted 7/13/18.

Whereas under date of Feb. 4th, 1914, there was prepared by M. J. Smith, civil engineer, under the direction and supervision of Mr. F. B. Drew, general manager of this company, and by him filed with the Commissioner to the Five Civilized Tribes, a certain map or plat showing the land to be reserved by this company for mining operations under its coal leases in the Choctaw Nation, as provided by the act of Congress approved February 19, 1912: Therefore be it

Resolved, That the act of the said F. B. Drew in preparing and filing said map or plat be in all things approved, ratified, and confirmed; and that said map or plat correctly shows and describes the land required and selected by this company to be reserved for its mining operations under said leases, as provided by the terms of the act of Congress above referred to.

STATE OF OKLAHOMA,
County of Pittsburg, ss:

I, E. S. Rea, president of the McAlester-Edwards Coal Company, do hereby certify that the above and foregoing is a full, true, and correct copy and transcript of a resolution adopted at a regularly called and convened meeting of the board of directors of said company, held at Coffeyville on the 13th day of July, 1915, as the same appears of record in the minutes of said meeting.

Witness my hand and the seal of said company this 13th day of July, 1915.

[SEAL.] (Signed) E. S. REA, *President.*

24

Tract No.	Description.
817	N. W. ¼ of S. E. ¼, Sec. 16–3 N.–14 E.
	Lot 9, Pittsburg T. S. Add. #23.
	" 10 " " " "
	" 11 " " " "
	" 14 " " " "
52–52	S. W. ¼ of S. E. ¼, Sec. 24–3 N.–13 E.
65–66	Kiowa T. S. #22.
67	Kiowa T. S. #22, S. W. ¼ of S. E. ¼ of S. E. ¼, Sec. 24–3, N.–13 E.
765	E. ½ of N. E. ¼ of Sec. 25–3 N–13 E.
825	S. ½ of S. E. ¼ of S. E. ¼, Sec. 17–3, N.–14 E.
817	N. E. ¼ of S. W. ¼ of Sec. 16–3 N.–14 E.
817	N. ½ of S. E. ¼ of S. W. ¼, Sec. 16–3 N.–14 E.
817	N. ½ of S. ½ of S. E. ¼ of S. W. ¼, Sec. 16–3 N.–14 E.
	Our portion of improvements 817.
815	E. ½ of S. W. ¼ of S. W. ¼, Sec. 16–3 N.–14 E.
815	S. W. ¼ of S. W. ¼ of S. W. ¼, Sec. 16–3 N.–14 E.
824	S. ½ of S. ½ of S. W. ¼ of S. E. ¼, Sec. 17–3 N.–14 E.
	Lot # 2 Pittsburg T. S. Add. #24
	Lot # 1 " " " 24
	Lot # 3 " " " 24
	Lot # 12 " " " 24
	Lot # 13 " " " 24
	Lot # 14 " " " 24
	Lot # 15 " " " 24
	Lot # 16 " " " 24
	Lot # 17 " " " 24
	Lot # 18 " " " 24
	Lot # 19 " " " 24
	Lot # 20 " " " 24
	Lot # 21 " " " 24
	Lot # 22 " " " 24
	Lot # 23 " " " 24
	Lot # 24 " " " 24
	Lot # 25 " " " 24
	Lot # 26 " " " 24
	Lot # 27 " " " 24
	7.39 A. less .72 A. Ry. R. of W.
	Lot # 8 Pittsburg T. S. Add. #24
	Lot # 9 " " " 24
	Lot # 11 " " " 24
	Lot # 31 " " " 24
	Lot # 32 " " " 24

Tract No.	Description.				
824	Lot # 33	Pittsburg	T.S.	Add.	#24
	Lot # 34	"	"	"	24
	Lot # 35	"	"	"	24
	Lot # 36	"	"	"	24
	Lot # 37	"	"	"	24
25	Lot # 38	"	"	"	24
	Lot # 30	"	"	"	23
	Lot # 31	"	"	"	23
	Lot # 32	"	"	"	23
	Lot # 33	"	"	"	23

Rule to show cause.

Filed December 10, 1920.

* * * * * * *

Upon consideration of the petition for mandamus herein exhibited, it is this 10th day of December, 1920,

Ordered, that the defendants John Barton Payne, Secretary of the Interior; Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semples, principal chief of the Choctaw Nation, and each of them, show cause on the 14th day of January, 1921, at ten (10) o'clock a. m., if any they, or either of them, have why they should not be by this court commanded to accept the tender of purchase price heretofore and now made by the relator, the McAllister-Edwards Coal Company, a corporation, and to deliver or cause to be delivered to the McAllister-Edwards Coal Company a patent evidencing the sale and effecting the conveyance to it of all of the right, title, estate, and interest of the Choctaw and Chickasaw Nations of Indians, except the coal and asphalt reserved in and to the realty described in said petition, subject only to the limitations and exceptions provided by the act of Congress of February 8, 1918, and of February 19, 1912, as prayed in said petition, provided that a copy of said petition and of this rule to show cause be served upon the said defendants and each of them on or before the 14th day of December, 1920.

F. L. SIDDONS, *Justice.*

Respondents' answer.

Filed January 18, 1921.

* * * * * * *

Come now John Barton Payne, Secretary of the Interior; Douglas H. Johnston, governor of the Chickasaw Nation of Indians, and William F. Semple, principal chief of the Choctaw Nation of Indians, respondents in the above-entitled cause, and for answer to the petition and by way of return to the rule to show cause herein issued, say:

They admit the averments on pages 1 to the last paragraph on page 6, inclusive, in so far as the same are allegations of fact, excepting from the effect of this admission the averment on page 4 of the peti-

tion to the effect that relator "had and was entitled to the free occupancy of the surface of all the lands covered by said leases,"
26 and as to that they say that in so far as the same may be construed as an averment of fact, to wit, that the relator had actually the occupation of all said land, they deny said allegation, and in so far as the same amount to an averment that the relator was entitled thereto as matter of law, they are advised that the same presents a conclusion of law which they need not answer; and further excepting the averments on pages 4 to 6 to the effect that the Secretary of the Interior entered into an agreement with relator relative to said lands, as to which they state the facts to be as follows: That the relator failing to exercise its right to purchase the surface to the extent authorized by the act of February 19, 1912 (37 Stat., 67), the Secretary of the Interior, acting under section 2 of said act, in his discretion and with the consent of the relator, designated certain portions of the land occupied by said company as necessary to its continued operations and reserved the same from sale, the residue not thus designated becoming thereby subject to sale; and as to whether such action so taken constitutes a contract between relator and said Secretary respondents are advised that the same presents a conclusion of law which they need not answer.

Answering the averments of the petition on pages 8 and 9, they state the facts to be that pursuant to the act of Congress of February 8, 1918, and under rules and regulations by him prescribed, the Secretary of the Interior caused an appraisement to be made by three competent persons of all the surface lands belonging to the Choctaw and Chickasaw Nations of Indians in Oklahoma embraced within coal-mining leases and reserved from sale, including the lands here in controversy, for the purpose of fixing the price to be paid therefor by the said coal-mining lessees, including relator, in the exercise of the preferential rights of purchase granted by said act; that under said appraisement the price at which the relator could acquire title to the surface of the lands herein in controversy was $20,482.60, but, they say, after said valuation had been so fixed and notwithstanding the same, the Secretary of the Interior permitted his subordinate officers to receive applications for purchase of said lands by lessees, including the relator herein, at a different valuation, to wit, at a valuation placed thereon by an appraisement made some years before under authority of the act of February 19, 1912, aforesaid, and which was less than the true valuation as fixed by said 1918 appraisement, said 1912 appraisement being as to the lands here in controversy in the sum of $9,050.53; that said action was taken upon the view that the appraisement referred to in the act of 1918 was, by a proper construction, the appraisement theretofore made under said act of 1912; that it was pursuant thereto that the relator tendered as the purchase price and as alleged on pages 7 and 8 of the petition, the amount based upon the 1912 and not upon the 1918 appraisement. They further aver, however, that the aforesaid action took place without notice to the Choctaw and Chickasaw

Nations or either of them; that thereafter when the same was called to the attention of the proper representatives of said nations,
27 due protest was promptly made on their behalf to the Secretary of the Interior against the approval of the entire schedule of applications to purchase, including relator's, upon the ground that the same was unauthorized by proper construction of said act of 1918 and on the further ground that it was inequitable and unjust, causing a loss to said nations of a sum of approximately $300,000, the difference between the 1918 and the 1912 appraisements of the surface of said segregated coal lands; that thereupon the said protest was set down for hearing at a time and place certain, with due notice to all parties in interest; that at said time and place the protestants appeared by their duly authorized representatives and the lessees, including the relator, likewise appeared and the matter came on to be heard before the Secretary; that the Secretary after hearing oral arguments and after the consideration of written briefs filed in behalf of each party, and being now fully advised in the premises construed the act of 1918 as authorizing the new appraisement and requiring the sale of said land thereunder, sustained the said protests, and directed that the schedule of applications to purchase, including the relator's application, should be disapproved in its entirely and that all moneys tendered thereunder should be returned to the bidders, including the relator; that thereafter said lessees, including the relator, prayed a reharing which was allowed and was had and the whole matter was again considered by the Secretary with the result that the said Secretary, convinced of no error in his ruling aforesaid, reaffirmed said decision, holding the leesees, including the relator, were entitled to purchase under the act of 1918 only under the appraisement made subsequently to said act.

Wherefore, having made complete answer to the petition and return to the rule to show cause, they pray that said rule may be discharged; that said petition may be dismissed, and that they may be permitted to go hence without day.

JOHN BARTON PAYNE,
Secretary of the Interior.
DOUGLAS H. JOHNSTON,
Governor of the Chickasaw Nation.
WILLIAM F. SEMPLE,
Principal Chief of the Choctaw Nation.

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.
REFORD BOND,
Chickasaw National Attorney.
WALTER J. TURNBULL,
Choctaw National Attorney.

STATE OF OKLAHOMA,
County of Johnson, ss:

I, Douglas H. Johnston, being first duly sworn, say that I am governor of the Chickasaw Nation of Indians; that I have read
28 over and am acquainted with the contents of the foregoing averment by me subscribed; and that the matters of fact therein set forth I am informed are true and I believe them to be true.

DOUGLAS H. JOHNSTON,
Governor of the Chickasaw Nation.

Subscribed and sworn to this 5th day of January, 1921.
Before me:
[SEAL.] N. M. SON,
Notary Public in and for the County of Johnston.
My com. ex. Jan. 13, 1924.

STATE OF OKLAHOMA,
County of Bryan, ss:

I, William F. Semple, being first duly sworn, say that I am principal chief of the Choctaw Nation of Indians; that I have read over and am acquainted with the contents of the foregoing averment by me subscribed; and that the matters of fact therein set forth I am informed are true and I believe them to be true.

WILLIAM F. SEMPLE,
Principal Chief of the Choctaw Nation.
Subscribed and sworn to this 28 day of Dec., 1920.
Before me:
[SEAL.] ALICE BRENTZ,
Notary Public in and for the County of Bryan.
Comm. expires: Aug. 23-1924.

Demurrer to answer.

Filed February 2, 1921.

* * * * * * * * * *

Comes now here the petitioner by its attorneys, William H. Fuller, James W. Beller, and Conrad H. Syme, and demurs to the answer herein made by the respondents, John Barton Payne, Secretary of the Interior, et al., and says that said return is bad in substance.

WM. H. FULLER.
JAMES W. BELLER.
CONRAD H. SYME.

The matters of law intended to be argued in support of the foregoing demurrer are the following:

1st. That under the act of Congress approved February 19, 1912 (Pub. No. 91), entitled "An act to provide for the sale of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes," the Secretary of the Interior was required to appraise the surface lands described in the petition

for mandamus, and he and the governor of the Choctaw Nation
29 and the chief of the Chickasaw Nation were required under the act of Congress approved February 8, 1918, to accept from the coal lessees of said lands, upon tender being made thereof, the amount at which said lands were appraised under and by virtue of the act of February 19, 1912, and to execute and deliver to said preferential lessees a good and sufficient patent or title therefor.

2nd. That the act of Congress, approved February 8, 1918 (Pub. 98), entitled "An act providing for the sale of the coal and asphalt deposits in the segregated mineral lands of the Choctaw and Chickasaw Nations" did not authorize the Secretary of the Interior to reappraise the surface of said lands or require the lessee of said lands to pay such reappraisal value in order that said lessee might purchase all of the surface of the lands lying within its said lease held by it and theretofore reserved by order of the Secretary of the Interior, but did specifically give to said lessee the right to purchase all of the surface of said lands at the appraised value thereof as made by the direction of the Secretary of the Interior under the provisions of the act of Congress, approved February 19, 1912.

3rd. That the acceptance by the respondents from said lessee of the sum of money equal to the amount at which the surface of the lands were appraised under the Act of 1912, and the issuance by them to the petition, a preferential lessee, of a sufficient muniment of title, is purely a ministerial act, and that upon the said amount having been tendered by the lessee to the respondents and their refusal to perform said duty as set forth in the petition, the court has the right to compel the respondents to accept said amount and to execute a good and sufficient muniment of title to the preferential lessee so tendering the purchase price of said surface lands.

Supreme Court of the District of Columbia.

THURSDAY, MARCH 10TH, 1921.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, justice, presiding.

* * * * * * *

Upon consideration of the motion of petitioner filed herein March 8" 1921, it is ordered that Albert B. Fall, the present Secretary of the Interior, be substituted as defendant in the place and stead of the defendant John Barton Payne.

Memorandum of court.

Filed May 23, 1921.

* * * * * * *

Hearing on demurrer to respondents' answer to petition for a writ of mandamus.

The specific prayer for relief sought by the relator is, that the writ of mandamus be issued and directed to the respondents

"commanding them to accept the tender of purchase price heretofore and now made by McAlester-Edwards Coal Company, and to deliver or cause to be delivered to McAlester-Edwards Coal Company, patent evidencing the sale and affecting the conveyance to McAlester-Edwards Coal Company, of all of the right, title, estate, and interest of the Choctaw and Chickasaw Nations of Indians, except the coal and asphalt reserved, in and to the realty hereinabove particularly described, subject only to the limitations and exceptions provided by the said act of February 8, 1918, and the said act of February 19, 1912."

The material facts are that the relator was the lessee under several leases of the right to prospect and mine for coal in the lands described in these leases and is and has been for a number of years, engaged in coal mining operations in the lands so leased. That under and by virtue of the provisions of an act of Congress approved February 19, 1912, 37 Statutes at Large, p. 67, this lessee could, if it desired to do so, purchase at the appraised value and upon terms and conditions prescribed by the act, a sufficient amount of the *surface* of the land covered by its leases to embrace improvements actually used in present mining operations or necessary for future operations, up to five per centum of such *surface*, and the act further conferred upon the Secretary of the Interior in his discretion, the power to enlarge the amount of land that might be thus purchased, to not more than ten per centum of the surface, and that in the event that a lessee should fail to apply to purchase under the provisions of the act within the time prescribed, the Secretary of the Interior might, in his discretion, and with the consent of the lessee, designate and reserve from sale such tract or tracts as he might deem proper and necessary to embrace improvements actually used in present mining operations or necessary for future operations under any existing lease, and might dispose of the remaining portion of the *surface* within such lease free and clear of any claim by the lessee except for the purpose of future operations, prospecting, and for ingress and egress as thereafter reserved. Pursuant to said act of Congress, the Secretary of the Interior classified and appraised the *surface* of the segregated coal and asphalt lands of said Indian nations, including the *surface* of the lands held by the relator under its leases. That the relator elected not to purchase under the provisions of this statute, and failed to apply for purchase, and that thereafter the Secretary of the Interior with the consent of the relator, designated and reserved from sale as proper and necessary to embrace improvements actually used in its present mining operations or necessary for future operations under its existing leases, certain designated lands which are described in paragraph two of the petition and on page five thereof. Later the Congress, by an act approved February 8, 1918, 40 Statutes at Large, p. 433, provided for the sale of the coal and asphalt deposits in the segregated mineral land in the Choctaw and Chickasaw Nations in the State

of Oklahoma, and it required, before such a sale took place, that the Secretary of the Interior should cause such coal and asphalt mineral deposits to be appraised, and such an appraisement took place. The act further provided that any lessee should have the preferential right, provided the same was exercised within ninety days after the approval of the completion of the appraisement of the minerals as in said act provided, to purchase "at the appraised value any or all of the *surface* of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior." [Underscoring by the court.] It further appears that pursuant to this last-mentioned act of Congress, and under rules and regulations by him prescribed, the Secretary of the Interior, caused an appraisement to be made of all the *surface* lands belonging to the Indian nations mentioned, embraced within coal mining leases and reserved from sale, including the lands here in controversy, for the purpose of fixing the price to be paid therefor by such lessees, including the relator, in the exercise of the preferential right to purchase granted by the act. That appraisement of the lands in controversy amounted to $20,482.60. It further appears, though not quite so specifically that the appraisement of the surface of these lands under the earlier act of February 19, 1912, amounted to $9,050.53, an amount less than one-half of the latter appraisement, and the controversy seems to have arisen over the contention made by the relator that the basis of the purchase by it of the surface of said lands should be the earlier appraisement, while that of the respondents is that the later appraisement must control.

On November 6, 1918, the relator undertook to exercise its preferential right granted by the act of February 8, 1918, 40 Statutes at Large, p. 433, to purchase the *surface* of said lands, and it made a payment on account thereof of $2,291.76, which, it alleges in its petition, was accepted by a responsible and appropriate official, one Gabe E. Parker, superintendent of the Five Civilized Tribes, at Muskogee, Oklahoma. It is apparent from the pleadings that at the time this payment was made, conflicting opinions respecting the basis of the price for which a purchase could be made were in existence. These conflicting opinions were evidently then under consideration by the respondent Secretary of the Interior. It further appears, however, as an undenied fact, that the Secretary of the Interior caused the relator to be informed, under date of November 20, 1918, that its purchase would be based upon the earlier appraisement. The respondents, in their answer, with proper candor, state that the action of the Secretary of the Interior under which the relator undertook to become the purchaser of the surface lands in question under the earlier appraisement "was taken upon the view that the appraisement referred to in the act of 1918 was, by a proper construction, the appraisement theretofore made under said act of

1912" and that it was pursuant thereto that the relator tendered as the purchase price the amount based upon the 1912 and not upon the 1918 appraisement. The respondents further aver, however, that this action took place without notice to the Choctaw and Chickasaw Nations or either of them, and when their representatives learned of it due protest was promptly made on behalf of said nations to
32 the Secretary of the Interior, upon the ground that the same was unauthorized by any proper construction of the act of February 8, 1918. That the Secretary took cognizance of the protest and a hearing was had thereon, at which the protestants appeared by their duly authorized representatives, and the relator and the respondent Secretary, after hearing oral arguments and after consideration of written briefs filed in behalf of each party, considered the act of February 8, 1918, as authorizing the later appraisement and "requiring the sale of said land thereunder," and he sustained the protests and directed, among other things, that the relator's application to purchase said lands should be disapproved in its entirety and that all money paid thereunder should be returned to it. That thereafter, upon the application of the relator and other lessees occupying a similar status, a rehearing was allowed and the whole matter again considered by the Secretary of the Interior, who, as a result, adhered to his prior ruling and reaffirmed his decision, holding that the relator and others in a similar status were entitled to purchase such surface lands under the act of 1918 *only under the appraisement made subsequently to said act.*

Under the foregoing state of affairs the relator's main contentions are two-fold, one, that the last construction of the act of February 8, 1918, by the Secretary of the Interior, with respect to the appraisement is a mistaken one, and that the correct construction is that the appraisement of 1912 is the appraisement intended by the act to be the basis of the purchase of the surface of the lands in question, and, two, that when there was accepted by the Secretary, through a duly authorized official, the first payment made by the relator on account of its proposed purchase, on November 6, 1918, a contract of purchase and sale was established, and that the respondent Secretary of the Interior had thereafter no other duty to perform but to carry out the terms of said contract, upon the performance by the relator of the stipulations thereof on its part to be performed, which meant the payment of the full contract price, and this the relator in proper time tendered, and has ever since maintained its tender good. This being so, the relator insists that what remains to be done on the part of the Secretary of the Interior is a mere ministerial act, the performance of which can be coerced by this court under its process of mandamus.

There are, it seems to the court, serious jurisdictional questions involved in these contentions.

It is obvious, from the structure of the relator's petition, that in substance its claim is based upon supposed contract rights out of which grow equitable rights of ownership, the recognition and enforcement of which may, it is contended by the relator, be enforced by the writ of mandamus. Is this a sound position under established principles controlling the exercise by this Court of the process of mandamus against the head of a department, charged with heavy and responsible duties involving constantly the exercise of sound discretion and judgment with respect to the disposition of lands in which the Indians have property rights to be conserved? It will be observed that the specific prayer of the petition is that the re-
33 spondents be commanded to accept the tender of the purchase price of the land and to deliver, or cause to be delivered to it, a patent for such land, effecting the conveyance to it of all the right, title, estate and interest of the Choctaw and Chickasaw Nations of Indians, in and to the same. This prayer, in substance, is not unlike the prayer for a specific performance of a contract for the purchase and sale of land. If it is this in substance, can the writ of mandamus be invoked, under the guise or form that it is only a ministerial act sought to be required to be performed, on the theory that no discretion remains to be exercised by the respondent or respondents to whom such a writ might be directed? It seems to the court that in principle, at least, the Supreme Court has decided this question adversely to the contention made on behalf of the relator.

In the case of Levey v. Stockslager, 129 U. S. 470, the court had under consideration a writ of error to review a judgment of this court delivered in general term. In that case, the petitioner applied for a writ of mandamus against the Commissioner of the General Land Office, to direct him to execute and deliver certain certificates of new location on certain lands, authorized under an act of Congress approved March 2, 1867. The petitioner grounded her right to the writ upon the theory, among other things, that she had acquired under said act of Congress, "a right which amounted to property, and of which she could not be deprived by the United States" (p. 477). The court, in dealing with this contention say (p. 478):

"But if the contention of the relator, that the provisions of the act of March 2, 1867, amounted to a contract between the United States and the widow and children, were correct, that very fact would show that the relief here sought could not be granted to the relator. She prays for a writ of mandamus against the Commissioner of the General Land Office, to issue and deliver to her the certificates of new location; but, in case her claim were in fact founded on contract, her demand for relief would substantially amount to a prayer that the United States be decreed specifically to perform the contract. No jurisdiction is given by any statute to the Supreme Court of the District of Columbia of a suit against the United States or a public

officer for the specific performance of a contract made by the United States."

In essence, it seems to the court, the relator's position in this regard is, that it had entered into a binding contract with the United States for the acquisition of certain land, the power of its disposition, if not its ownership, being in the United States, to be exercised, if at all, it is true, by designated officers of the United States Government, and the relator specifically prays in its petition that the respondent officers of the United States Government be required to accept the purchase price tendered by the relator for the land in question, and to deliver or cause to be delivered to it a deed (patent) therefor. This, it seems to the court, under the authority of Levey v. Stockslager, supra, is not within its jurisdiction in such a proceeding as this, to command.

34 There is, too, another jurisdictional difficulty suggested by the first of the two contentions of the relator stated above, and that difficulty lies in this, that it is clear that considerable doubt exists as to whether the appraisement of the lands mentioned in the act of 1918 relates to the appraisement made under the act of 1912, or under the former act, a doubt which evidently gave to the Secretary of the Interior no little difficulty in resolving to his own satisfaction. He apparently first took a view in consonance with the relator's interpretation of the act, but later, and after apparently exhaustive arguments pro and con, and careful consideration by him, first upon the original hearing held upon the protests of the Indians as heretofore set out, and again upon a rehearing, came to the conclusion that the true construction of the act required him to hold that the basis of purchase price of the lands in question must be the appraisement made under the act of 1918, and not the one made under the act of 1912. Without attempting, in this opinion, to indicate a view as to the correct interpretation or construction of the act, we are, the court thinks, brought face to face with the principle laid down by the Supreme Court in the case of The United States ex rel. Hall v. John Barton Payne, Secretary of the Interior, 49 Wash. Law Rep. 133, decided by that court on December 13, 1920. This was also a proceeding in mandamus, instituted in this court, and in which the relator claimed that he had acquired a right, under homestead laws, to certain land, of which he was deprived by the action of the Secretary, acting, it was alleged, arbitrarily. And he prayed that the writ of mandamus issue, directed to the Secretary, commanding him to approve the relator's application for the land which he had, it was said, appropriately located, and to deliver to him the proper evidence of his right. To the respondent's return in that case, a demurrer was interposed by the relator. The Supreme Court said, in the course of its opinion, p. 134, that this court stated:

"That there were two questions in the case, one, whether the facts exhibited a case for mandamus of the Secretary, that is, 'in apparent defiance of the law, acting capriciously or arbitrarily or beyond the

scope of the administrative authority confided to him,' the other, the construction of the act of 1894.

"To the first question the court answered negatively, and to the second question replied, that 'independently of the question of the propriety of reviewing the act of the Secretary of the Interior in the pending case, it would seem that the decision rendered by him was one entirely permissible under the law.' The demurrer to the return was therefore overruled. The relator electing to stand upon it, the rule was discharged and the petition dismissed.

"This action was affirmed by the Court of Appeals, 47 Wash. Law Rep. 50."

The Supreme Court, after making the foregoing quoted statement, proceeds to say that:

"It is manifest from this statement that the petition presents a controversy over the true construction of the act of 1894. From the act, and the Secretary's decision, it is apparent that the latter
35 was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved 'from any adverse appropriation' means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view. He could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. Riverside Oil Company v. Hitchock, 190 U. S. 316; Ness v. Fisher, 223 U. S. 683."

Can it be said that in this case the decision of the respondent Secretary of the Interior was arbitrary or capricious, or that it did not rest upon a possible construction of the act of February 8, 1918? On the contrary, this court is of opinion that as the facts are now before it, there was nothing arbitrary or capricious about the respondent's action. Those facts indicate that he gave great consideration to the question and as a result thereof performed a duty which in its performance required him to reverse a previously held view of the construction of the statute. And that his latest construction of the act is at least a possible one, seems clear to the court, and being so, under the authority of the Hall case, this court has no power, in a proceeding in mandamus, to review his opinion and to reverse his decision, if indeed this court was of the opinion that he was mistaken in his construction, about which, however, the court is not to be understood as intimating its own view, if it has one.

For the reasons stated, the relator's demurrer to the respondent's answer must be, and it is hereby, overruled this 23rd day of May, A. D. 1921.

By the court.

F. L. SIDDONS, *Justice.*

Supreme Court of the District of Columbia.

THURSDAY, MAY 26TH, 1921.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * * * *

Upon consideration of the demurrer filed herein to the answer of respondent, it is ordered that said demurrer be, and the same is hereby, overruled.

Supreme Court of the District of Columbia.

WEDNESDAY, JUNE 29, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

36 It appearing to the court that the demurrer of petitioner to answer of respondents was overruled May 26, 1921, and the petitioner now in open court elects to stand upon said demurrer, judgment is ordered.

Therefore it is considered that the rule to show cause be, and it is hereby, discharged, the petition is dismissed, and that the respondents recover of petitioner the costs of their defense, to be taxed by the clerk, and have execution thereof.

From the foregoing the petitioner by its attorneys of record in open court notes an appeal to the Court of Appeals, and the maximum of an undertaking for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100) or, in lieu thereof, a deposit of fifty dollars ($50).

Memorandum.

July 11, 1921.—$50 deposited in lieu of appeal bond.

Assignments of error.

Filed July 13, 1921.

* * * * * * *

1. The court erred in overruling the demurrer of the relator to the answers of the respondents.

2. The court erred in dismissing the petition of the relator, the McAlester-Edwards Coal Company.

JAMES W. BELLER,
CONRAD H. SYME,
Attorneys for McAlester-Edwards Coal Company, Petitioner.
W. H. FULLER,
Of Counsel.

Designation of record.

Filed July 13, 1921.

* * * * * * *

The clerk will please prepare the transcript of record for the appeal of the undersigned, and the following papers are hereby designated as necessary to be copied and included in said transcript:

1. The petition and exhibits.
2. Rule to show cause.
3. Answer of respondents.
4. Demurrer to answer of respondents.
5. Order overruling demurrer to answer and opinion of court.
6. Judgment.

37 7. Assignment of errors.

8. This designation of record.

JAMES W. BELLER,
CONRAD H. SYME,
Attorneys for McAlester-Edwards Coal Company, Petitioner.

W. H. FULLER,
Of Counsel.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 52, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 64820 at law, wherein The United States of America, ex relatione McAlester-Edwards Coal Company, a corporation, is petitioner and John Barton Payne, Secretary of Interior, et al. are respondents, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of July, 1921.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH, *Clerk.*
E. W.

(Endorsed on cover:) District of Columbia Supreme Court. No. 3695. The United States of America ex relatione McAlester-Edwards Coal Company, a corporation, appellant, vs. Albert B. Fall, Secretary of the Interior; Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semple, principal chief of the Choctaw Nation. Court of Appeals, District of Columbia. Filed Jul. 26, 1921. Henry W. Hodges, clerk.

(4435)

38 TUESDAY, DECEMBER 6TH, A. D. 1921.

* * * * * * *

THE UNITED STATES OF AMERICA EX RELATIONE McAlester-Edwards Coal Company, a corporation, appellant,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR; DOUGLAS H. Johnson, Governor of the Chickasaw Nation, and William F. Semple, Principal Chief of the Choctaw Nation. } No. 3695.

The argument in the above entitled cause was commenced by Mr. Geo. M. Porter, attorney for the appellant, and was continued by Mr. C. E. Wright, attorney for the appellees, and was concluded by Mr. C. H. Syme, attorney for the appellant.

39 In the Court of Appeals of the District of Columbia.

THE UNITED STATES OF AMERICA EXRELATIONE McAlester-Edwards Coal Company, a Corporation, Appellant,

vs.

ALBERT B. FALL, SECRETARY OF THE INTERIOR; Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semple, Principal chief of the Choctaw Nation, Appellees. } No. 3695.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the court:

This appeal is from a judgment of the Supreme Court of the District of Columbia denying a writ of mandamus to compel the Secretary of the Interior and the other formal respondents to receive a balance alleged to be due upon the purchase price of certain coal lands in Oklahoma and to issue a patent therefor.

It is alleged by the petitioner, the McAlester-Edwards Coal Company, and admitted by the Government, that, under the provisions of the act of Congress of July 1, 1902 (32 Stats. L., 641), the Secretary of the Interior reserved the lands in question from allotment to the individual members of the Choctaw and Chickasaw Nations; that petitioner is the owner of coal-mine leases upon said lands, executed under the act of Congress of June 28, 1898 (30 Stats. L., 495), and extended in area under the act of Congress of March 4, 1913 (38 Stats. L., 599).

By the act of Congress of February 19, 1912 (37 Stats. L., 67), the Secretary of the Interior was authorized to sell the surface leased and unleased of the lands segregated and reserved under the act of

July 1, 1902, reserving the coal and asphalt thereunder. The
40 act required the Secretary to classify and appraise the surface to be sold. Section 2 of the act provided "that after such classification and appraisement has been made each holder of a coal or asphalt lease shall have a right for sixty days, after notice in writing, to purchase, at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up to five per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be approved by the Secretary of the Interior: *Provided*, That the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lessee to not more than ten per centum of such surface: *Provided further*, That such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved: *Provided further*, That if any lessee shall fail to apply to purchase under the provisions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for the purposes of future operations, prospecting, and for ingress and egress, as hereinafter reserved."

Pursuant to this act, the Secretary classified and appraised the lands, but appellant company elected not to purchase under the provisions of the act; since, under the terms of its leases, it claimed the
41 right to the free use of sufficient surface lands to enable it to conduct its mining operations. In recognition of this claim, the Secretary alleges in his answer: "That the relator failing to exercise its right to purchase the surface to the extent authorized by the act of February 19, 1912 (37 Stat., 67), the Secretary of the Interior, acting under section 2 of said act, in his discretion, and with the consent of the relator, designated certain portions of the land occupied by said company as necessary to its continued operations and reserved the same from sale, the residue not thus designated becoming thereby subject to sale."

By the act of Congress of February 8, 1918 (40 Stats. L., 433), the Secretary of the Interior was authorized to sell the coal and asphalt mineral deposits in the segregated mineral lands of the Choctaw and Chickasaw Nations, and was required, before offering the same for sale, to cause them to be appraised. Pursuant to this act, appellant company purchased the coal under at least one of its leases, paying therefor $83,319.32. The act, among other things, provides: "That

any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior." Pursuant to this provision of the act, officers of the department, acting under the Secretary, within ninety days after the completion of the appraisement of the minerals, notified appellant company of the price at which its reserved surface lands could be purchased, based upon the appraisement made under the act of 1912, and, within the time required by law, appellant company exercised its preferential right to purchase, and paid its first payment of $2,291.76, which was duly accepted. Appellant company thereafter, within the time prescribed by the Secretary, made payments, and on October 15, 1920, tendered the balance of the purchase price—$10,360.06—which was refused. Hence, this
42 action to compel the Secretary to accept the balance of the purchase price and execute a patent for the lands in controversy.

The Secretary attempts to justify his refusal upon the ground that, under the act of 1918, he was authorized to make a new appraisement of said lands and sell them upon that basis. In pursuance thereof, he answers that he "caused an appraisement to be made by three competent persons of all the surface lands belonging to the Choctow and Chickasaw Nations of Indians in Oklahoma embraced within coal-mining leases and reserved from sale, including the lands here in controversy, for the purpose of fixing the price to be paid therefor by the said coal-mining lessee, including relator, in the exercise of the preferential rights of purchase granted by said act."

The Secretary then alleges the valuation fixed upon appellant's land to be $20,482.60, but that he "permitted his subordinate officers to receive applications for purchase of said lands by lessees, including the relator herein, at a different valuation, to wit, at a valuation placed thereon by an appraisement made some years before under authority of the act of February 19, 1912."

Petitioner demurred to the answer of respondents. On hearing, the court overruled the demurrer, and petitioner electing to stand upon the demurrer, judgment was entered discharging the rule and dismissing the petition. From the judgment this appeal was prosecuted.

Coming to the construction of the statutes, we think there is no room for doubt as to their meaning. They relate to the same subject, and confer rights respecting the same subject matter. The act of 1912 provided for an appraisement of the surface of the reserved lands, with a view to their sale. This appraisement was had in compliance with the statute, and reduced to record. The act of 1918 provided for an appraisement of the minerals under the lands, with a view to their sale. Money was appropriated

43 from the funds of the Indians to meet the expenses of the two appraisements, and the most specific directions as to how they should be conducted were contained in the statutes.

In respect of the appraisement of the surface of the reserved lands, the act of 1918 contains no directions as to how such an appraisement should be made and no provision for the payment of the expenses thereof. It is clear, we think, from a comparison of the two acts that the right granted by the act of 1918 to purchase "at the appraised value" meant, and could only mean, the price fixed by the appraisement under the act of 1912.

The construction contended for by the Government would preclude generally the exercise of preferential rights under the act of 1918. The act provides that a person or company desiring to avail itself of the right must do so, if at all, "within ninety days after the approval of the completion of the appraisement of the minerals, as herein provided." It is conceded that the attempted appraisement of the lands did not occur until long after that date. Indeed, the department was proceeding to dispose of the lands at the price fixed by the appraisement made under the act of 1912, and payments had been received on the sales so made, when suddenly the Secretary changed front and ordered an appraisement to be made under the act of 1918. Besides, if such an appraisement of the lands was authorized by the 1918 act, why was not the time for purchase fixed with reference to that appraisement, rather than the appraisement of the minerals?

Contractual relation between the United States and appellant company is not here involved. Congress was dealing with Indian lands as guardian of the Indians, and granted a preferential right in appellant company to purchase the lands in question at a fixed price. No discretion was reposed in the Secretary, except to ascertain the facts which would bring appellant company within the class upon whom Congress conferred the right. That appellant company did comply with every requirement of law, except to yield to an erroneous interpretation of the statute, is conceded by respondents in their answer. It, therefore, appears that
44 nothing remains in the present case for the Secretary to do except the mere ministerial acts of accepting the balance of the purchase price and of directing the issuance of a patent.

We do not overlook the well-established rule that mandamus will not lie to control the exercise of discretion by an executive officer. But that applies where the law reposes in the officer the power to do an act upon the fulfillment of certain conditions, and compliance therewith must be found by the officer as a condition precedent to granting relief, or where the construction of a statute is essential to determine whether the party seeking relief under it comes within its provisions. In such a case the courts refuse to convert the writ of mandamus into a writ of error to review possible errors of the officer in his findings of fact or his interpretation of the law as a

basis for reaching his conclusion. But we are not confronted by such a situation, since it is conceded the conditions have been complied with and appellant company is within the preferential class provided for in the statute. The Secretary refuses to perform a purely ministerial act, solely upon a construction which he places upon the law, and insists that the court has no power in this sort of proceeding to disturb his conclusion. No discretion is committed to the Secretary in respect of the performance of the duties imposed by the statute in this case. The right of appellant company to purchase the land under one or the other appraisement is absolute, and the court is not foreclosed from deciding which the Secretary should apply.

This case, we think, falls squarely within the rule announced in Roberts vs. United States, 176 U. S., 221, 231, and quoted with approval in the recent case of Lane vs. Hoglund, 244 U. S., 174, 182, as follows: "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute,
45 this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, or how plainly they violated their duty in refusing to perform the act required."

Unless the relief here sought is granted, appellant company will be left without an adequate remedy to enforce its rights. Unlike cases involving the disposition of public lands, there will be no outstanding conflicting patent which would furnish ground for an action in equity, where the holder of such a patent might be adjudged to hold the title in trust for appellant company.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Justice SMYTH dissents.

46 TUESDAY, JANUARY 3RD, A. D. 1922.

* * * * * * *

THE UNITED STATES OF AMERICA EX RELATIONE McAlester-Edwards Coal Company, a corporation, appellant,
vs.
ALBERT B. FALL, SECRETARY OF THE INTERIOR, Douglas H. Johnson, Governor of the Chickasaw Nation, and William F. Semple, Principal Chief of the Choctaw Nation.
No. 3695, January term 1922.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of the court.

Per Mr. Justice VAN ORSDEL, January 3, 1922.

Mr. Chief Justice SMYTH dissents.

47 In the Court of Appeals of the District of Columbia

January term, 1922.

UNITED STATES EX REL. MCALESTER-EDWARDS COAL CO.,
v.
ALBERT B. FALL, SECRETARY OF THE INTERIOR, ET AL.
No. 3695.

Petition for allowance of writ of error.

Come now Albert B. Fall, Secretary of the Interior, Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semple, principal chief of the Choctaw Nation, appellees in the above-entitled cause, by their attorneys, and respectfully show that on or about the 3d day of January, 1922, this court entered a judgment herein in favor of the appellant and against the appellees, reversing a judgment of the Supreme Court of the District of Columbia in favor of said appellees; in which judgment of this court certain errors were committed to the prejudice of the appellees, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellees further show that the said judgment of this court is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of section 250 of the Judicial Code in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the Secretary of the Interior are drawn in question.

The appellees further show that said judgment is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250 in that the proper construction of an act of Congress, to wit, the act of February 8, 1918, is drawn in question by the appellees, defendants below.

48 Wherefore they pray that a writ of error may issue removing this cause to the Supreme Court of the United States for the correction of the errors assigned; that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States; and that the mandate of this court be stayed until further order.

ALBERT B. FALL,
Secretary of the Interior.

By his attorneys:
EDWIN S. BOOTH,
Solicitor.
C. EDWARD WRIGHT,
Attorney.

DOUGLAS H. JOHNSON,
Governor of the Chickasaw Nation.

By his attorney:
G. G. MCVAY,
Chickasaw National Attorney.

WILLIAM F. SEMPLE,
Principal Chief of the Choctaw Nation.

By his attorney:
E. D. CLARK,
Choctaw National Attorney.

49 In the Court of Appeals of the District of Columbia.

January term, 1922.

UNITED STATES EX REL. MCALESTER-Edwards Coal Co. v. ALBERT B. FALL, SECRETARY OF THE Interior, et al.	No. 3695.

Assignment of errors.

Come now Albert B. Fall, Secretary of the Interior, Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semple,

principal chief of the Choctaw Nation, appellees in the above-entitled cause, by their attorneys, and say that in the record and proceedings of the Court of Appeals, had herein, and in the rendition of the final judgment, manifest error has intervened to the prejudice of the said appellees, in this, to wit:

1. The court erred in reversing the judgment below denying the writ of mandamus and dismissing the petition.

2. The court erred in taking jurisdiction to review the Secretary of the Interior in his judgment as to the proper construction of the act of February 8, 1918, a statute which it was his duty to administer, and to require the substitution of the court's view of the construction of the said statute for his own.

3. The court erred in holding that the act of February 8, 1918, required the sale of the land involved at a price fixed by appraisement made under the act of February 19, 1912, and did not authorize the Secretary of the Interior to cause a new appraisement to be made or to sell under such new appraisal.

4. The court erred in denying the existence of the Secretary's power or duty to order a new appraisement under the condi-
50 tion shown by the record and the existence of his power and duty to refuse issue of patent unless and until the amount of the appraised value of the land, as ascertained by him, had been paid.

5. The court erred in holding that, on the record, only a purely ministerial act on the Secretary's part was involved.

6. The court erred in holding that unless the writ of mandamus issue, the appellant company would be left without an adequate remedy to enforce its rights.

7. The court erred in holding that the appellant company was entitled to a writ of mandamus.

8. The court erred in not affirming the judgment of the trial court.

EDWIN S. BOOTH,
Solicitor, Interior Department.
C. EDWARD WRIGHT,
First Assistant Attorney, Interior Department.
G. G. MCVAY,
Chickasaw National Attorney.
E. O. CLARK,
Choctaw National Attorney.

(Endorsed:) No. 3695. U. S. ex rel. McAlester-Edwards Coal Co., appellant, vs. Albert B. Fall, Secretary of the Interior, et al. Petition for allowance of writ of error and stay of mandate. Assignments of error. Court of Appeals, District of Columbia. Filed Jan. 17, 1922. Henry W. Hodges, clerk.

51 FRIDAY, JANUARY 20TH, A. D. 1920.

* * * * * * *

THE UNITED STATES OF AMERICA EX RELATIONE MCALESTER-Edwards Coal Company, a corporation, appellant. *vs.* ALBERT B. FALL, SECRETARY OF THE INTERIOR; DOUGLAS H. Johnson, Governor of the Chickasaw Nation, and William F. Semple, Principal Chief of the Choctaw Nation.	No. 3695.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate until further order, it is ordered by the court that said motion be, and the same is hereby, granted, and that the writ issue as prayed.

52 UNITED STATES OF AMERICA, ss:

The President of the United States, to the honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the redition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between the United States of America *ex relatione* McAlester-Edwards Coal Company, a corporation, appellant, and Albert B. Fall, Secretary of the Interior; Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semple, principal chief of the Choctaw Nation, appellees, a manifest error hath happened, to the great damage of the said appellees, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedly justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[Seal, Court of Appeals, District of Columbia.]

53 UNITED STATES OF AMERICA, *ss:*

To the United States of America ex relatione McAlester-Edwards Coal Company, a corporation, appellant, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Albert B. Fall, Secretary of the Interior; Douglas H. Johnson, governor of the Chickasaw Nation, and William F. Semple, principal chief of the Choctaw Nation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 20th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged Jan. 20, 1922.

JAMES W. BELLER,
CONRAD H. SYME,
Counsel for McAlester-Edwards Coal Co.

(Endorsed:) Court of Appeals, District of Columbia. Filed Jan. 20, 1922. Harry W. Hodges, clerk.

54 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 53, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America ex relatione McAlester-Edwards Coal Company, a corporation, appellant, vs. Albert B. Fall, Secretary of the Interior; Douglas H. Johnson, governor of the Chickasaw Nation; and William F. Semple, principal chief of the Choctaw Nation, No. 3695, January term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 21st day of January, A. D. 1922.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsed:) File No. 28668. District of Columbia, Court of Appeals. Term No. 258. Albert B. Fall, Secretary of the Interior; Douglas H. Johnson, governor of the Chickasaw Nation, et al., appellants, vs. The United States ex relatione McAlester-Edwards Coal Company. Filed January 23, 1922. File No. 28668.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

No. 258

In The Supreme Court

of

The United States

October Term, 1922.

HUBERT WORK, Secretary of the Interior, DOUGLAS H. JOHNSON, Governor of the Chickasaw Nation, et al., Plaintiffs in Error,

v.

THE UNITED STATES Ex Rel. McALESTER-EDWARDS COAL COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFFS IN ERROR

(Chickasaw and Choctaw Nations)

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In The Supreme Court

of

The United States

October Term, 1922.

HUBERT WORK, Secretary of the Interior, DOUGLAS H. JOHNSON, Governor of the Chickasaw Nation, et al., Plaintiffs in Error,

v.

THE UNITED STATES Ex Rel., McALESTER-EDWARDS COAL COMPANY.

No. 258

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT

This action for mandamus was instituted in the Supreme Court of the District of Columbia by the United States of America on the relation of the McAlester Edwards Coal Company, a corporation, against the Secretary of the Interior, the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation. After consideration of the petition the court issued its rule to the respondents to show cause. Respondents filed their answer and made return to the rule. Petitioner demurred to the answer

and the issues in the case are raised by the demurrer. There is no substantial difference in the matters alleged in the petition and the answer.

It appears that under the provision of an Act of Congress of July 1, 1902 (32 St. I.641) the Secretary of the Interior reserved the lands in question from allotment to individual members of the Choctaw and Chickasaw Nation. The McAlester Edwards Coal Company and others have coal mining leases on the land in controversy.

By an act of February 19th, 1912, Congress undertook to dispose of the surface of these lands without disposing of the minerals C 46 37 St. 67. This Act of Congress authorized the Secretary to classify and appraise the surface of these lands and after appraisement to sell the same. It further provided that after such classificaton and appraisement, each holder of a coal lease should have the right for sixty days to purchase a sufficient amount of the lands covered by his lease to embrace improvements actually used in the present mining operations or necessary for future operations not to exceed ten per cent of the whole amount used included in the lease, at the appraised value. It provided further that if any lessee should fail to exercise his preferential right to purchase, the Secretary might in his discretion, reserve from sale such tract or tracts of land as he might deem proper and necessary to embrace improvements actually used in the present mining operations or necessary for future operations under any existing lease. Pursuant to this law the Secretary caused these lands to be appraised. None of the lessees exercised their

preferential right under this Act and the Secretary reserved from sale a certain amount of the land included in each lease and sold the remainder.

On February 8, 1918, Congress passed an Act entitled "An Act providing for the sale of the Coal and Asphalt deposits in the segregated mineral lands of the Choctaw and Chickasaw Nations. This law authorized the Secretary of the Interior to sell the mineral deposits in the segregated area. The sale was to be made within six months after final appraisement and the appraisement was to be had within six months after the passage of the Act. (40 St. L. 433). Among other things Sec. 4 of said Act provided:

> Any lessee shall have the preferential right provided the same is exercised within ninety days after the approval of the completion of the appraisal of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided.

This controversy was the result of an attempt by the McAlester Edwards Coal Company and others to exercise their preferential right of purchase of the surface lands under the provisions of Sec. 4 just quoted. They made a first payment and tendered the balance to the Secretary which was refused. This action of mandamus was then instituted to compel the Secretary to accept the purchase price tendered and to compel him and the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation to

issue patents for the lands, on the grounds hereinafter stated in the demurrer (R 27-28) The reason for the Secretary's refusal and the other material facts are clearly set forth in the following portion of the answer of the respondents:

"They state the facts to be pursuant to the Act of Congress of February 8, 1918, and under rules and regulations by him prescribed, the Secretary of the Interior, caused an appraisement to be made by three competent persons of all the surface lands belonging to the Choctaw and Chickasaw Nations of Indians in Oklahoma embraced within coal mining leases and reserved from the sale including the lands here in controversy, for the purpose of fixing the price to be paid therefor by the said coal mining lessees including relator, in the exercise of the preferential right of purchase granted by said act; that under said appraisement the price at which the relator could acquire title to the surface of the lands herein in controversy was $20,482.60 but they say, after said valuation had been fixed and notwithstanding the same, the Secretary of the Interior permitted his subordinate officers to receive applications for the purchase of said lands by lessees, including relator herein, at a different valuation, to-wit, at a valuation made and placed thereon by an appraisement made some years before under authority of the Act of February 19, 1912, aforesaid, and which was less than the true valuation as fixed by said appraisement of 1918, said 1912 appraisement being as to the lands here in controversy in the sum of $9050.53; that said action was taken upon the view that the appraisement referred in the act of 1918 was,

by a proper construction, the appraisement theretofore made under said Act of 1912; that it was pursuant thereto that the relator tendered as the purchase price and as alleged on pages 7 and 8 of the petition, the amounts based upon the 1912 and not upon the 1918 appraisement. They further aver however, that the aforesaid action took place without notice to the Choctaw and Chickasaw Nations or either of them; that thereafter when the same was called to the attention of the proper representatives of said nations, due protest was promptly made on their behalf to the Secretary of the Interior against the approval of the entire schedule of the applications to purchase, including relator's, upon the ground that the same was unauthorized by proper construction of said act of 1918 and on the further ground that it was inequitable and unjust, causing a loss to said Nations of approximately $300,000, the difference between the 1918 and 1912 appraisements of the surface of said segregated coal lands. That thereupon the said protest was set down for a hearing at a time and place certain, with due notice to all parties in interest; that at said time and place the protestants appeared by their duly authorized representatives and the lessees, including the relator, likewise appeared and the matter came on to be heard before the Secretary; that the Secretary after hearing oral arguments and after the consideration of written briefs filed in behalf of each party and being now fully advised in the premises construed the act of 1918 as authorizing the new appraisement and requiring the sale of said lands thereunder, sustained the said protest, and directed that the schedule of application to purchase, including the relator's application should be

disapproved in its entirety and that all moneys tendered thereunder should be returned to the bidders, including the relator; that thereafter said lessees including the relator, prayed a rehearing which was allowed and was had and the whole matter was again considered by the Secretary with the result that the said Secretary, convinced of no error in his ruling aforesaid, reaffirmed said decision, holding the lessees, including the relator, were entitled to purchase under the Act of 1918 only under the appraisement made subsequent to said Act." (R. 24-26.

A demurrer was filed to the answer of the respondents and the demurrer raises the question as to what is the proper construction of the Act of February 8, 1918, and especially that portion of section 4, quoted supra. The demurrer states the matters of law intended to be argued in support thereof, are:

1st. That under the Act of Congress, approved February 19, 1912, (Pub. No. 91) entitled 'An Act to provide for the sale of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes,' the Secretary of the Interior was required to appraise the surface lands described in the petition for mandamus, and he and the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation were required under the Act of Congress, approved February 8, 1918, to accept from the coal lessees of said lands, upon tender being made thereof, the amount at which said lands were appraised under and by virtue of the Act of February 19, 1912, and to execute and deliver to said preferential lessees a good and sufficient patent or title therefor.

"Second. That the Act of Congress, approved February 8, 1918, (Pub. 98), entitled 'An Act providing for the sale of the coal and asphalt deposits in the segregated mineral lands of the Choctaw and Chickasaw Nations' did not authorize the Secretary of the Interior to reappraise the surface of said lands or require the lessee of said lands to pay such reappraisa, value in order that said lessee might purchase all of the surface of said lands lying within its said lease held by it and theretofore reserved by order of the Seceretary of the Interior, but specifically give to said lessee the right to purchase all of the surface of said land at the appraised value thereof as made by the direction of the Secretary of the Interior under the provision of the Act of Congress, approved February 19, 1912.

"Third. That the acceptance by the respondents from said lessee of the sum of money equal to the amount at which the surface of the lands were appraised under the Act of 1912, and the issuance by them to the petitioner, a preferential lessee, of a sufficient muniment of title, is purely a ministerial act, and that upon the said amount having been tendered by the lessee to the respondents and their refusal to perform said duty as set forth in the petition, the Court has the right to compel the respondents to accept said amount and to execute a good and sufficient muniment of title to the preferential lessee so tendering the purchase price of said surface lands." (R. 27-28).

The Supreme Court of the District of Columbia everruled the demurrer, dismissed the petition and ordered that the rule to show cause be discharged (R

R. (35) (Opinion R. 28). The petitioner appealed to the Court of Appeals of the District of Columbia and that Court reversed the judgment of the Supreme Court of the District of Columbia, Chief Justice Smythe dissenting (277 Fed. Reporter page 573 R. 37). The case was then brought on a writ of error to this court. The assignment of errors are as follows:

1. The court erred in reversing the judgment below denying the writ of mandamus and dismissing the petition.

2. The court erred in taking jurisdiction to review the Secretary of the Interior in his judgment as to the proper construction of the Act of February 8, 1918, a statute which it was his duty to administer, and to require the substitution of the court's view of the construction of the said statute for his own.

3. The court erred in holding that the act of February 8, 1918, required the sale of the land involved at a price fixed by appraisement made under the act of February 19, 1912, and did not authorize the Secretary of the Interior to cause a new appraisement to be made or to sell under such new appraisal.

4. The court erred in denying the existence of the Secretary's power or duty to order a new appraisement under the condition shown by the record and the existence of his power and duty to refuse issue of patent unless and until the amount of the appraised value of the land, as ascertained by him, had been paid.

5. The court erred in holding that, on the record, only a purely ministerial act on the Secretary's part was involved.

6. The court erred in holding that unless the writ of mandamus issue, the appellant company would be left without adequate remedy to enforce its rights.

7. The court erred in holding that the appellant company was entitled to a writ of mandamus.

8. The court erred in not affirming the judgment of the trial court.

* * * * *

ARGUMENT

I.

Mandamus will not lie to control the discretion and judgment of the Secretary in the construction of an Act where same is not arbitrary and capricious.

It is apparent that the entire question in this case depends upon the proper construction of that portion of Section 4 of the Act of Feb. 8, 1918, which we again set forth for convenience:

> "* * * any lessee shall have the preferential right provided the same is exercised within ninety days after the approval of the completion of the appraisal of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided."

It will be noted that this act merely provided that the lessee shall have the right to purchase at the appraised value and that there is nothing in the title or body of the act to indicate what appraisement was

meant, if any. In administering the act it then became necessary for the Secretary to construe it. Now, it appears that sometime after the passage of this Act the Secretary did construe it as authorizing an appraisement and caused an appraisement to be made. Later, however, he permitted his subordinates to offer for sale the lands herein involved at the appraisement of 1912. The Tribes protested this and at a time and place certain, the Secretary after hearing the argument and having fully considered the matter, adhered to his first construction of the Act. A rehearing was had with the same result. The Supreme Court of the District of Columbia sustained the view of the Secretary but the Court of Appeals was of a contrary opinion, Chief Justice Smythe dissenting. Here then we have divers and variant opinions as to the proper construction of the Act of 1918. If able jurists and great courts disagree over the proper construction of the Act, can it be said that the Secretary's decision was arbitrary and capricious and did not rest upon a possible construction of the act? Can it be said that his duty was so plain and obvious that there was no room left for the exercise of discretion and judgment? The law applicable to a case of this kind is well settled; mandamus will not lie, if from the Act and the Secretary's decision, it is apparent that the later was not arbitrary and capricious and rested upon a possible construction of the Act. Riverside Oil Company vs. Hitchock, 190 U. S. 316; Ness vs. Fisher, 223 U. S. 663.

A case decided by this Court, United States ex rel. John Hall vs. John Barton Payne, Secretary of the Interior, 254 U. S. 343, 41 Supt. Ct. Rep. 141, involved a

state of facts similar to the instant case and we think controls it. We quote from the opinion of the Court:

> "This case involves the consideration of a mandamus brought by plaintiff in error, hereinafter called relator, against the Secretary of the Interior.
>
> "The proceedings were instituted in the Supreme Court of the District of Columbia by petition, and its essential allegations stated narratively, are as follows:
>
> "The land in question was within a township which was reserved under an Act passed August 13, 1894, (28 St. L. 394, Chap. 301, from adverse appropriation by settlement or otherwise excepted under rights found to exist of prior inception, for a period to extend from the application for survey until the expiration of sixty days from the date of the filing of the township plat of the survey in the proper district land office.
>
> "The plat of the survey was filed in the proper district land office May 17, 1915. During the sixty day period, nor since the described land has not been selected by the State. On June 15, 1915, the relator settled on the land, and on July 17, 1915, was still actually residing thereon with the bona fide intention and purpose of appropriating and entering it under the Homestead Laws of the United States, in the event that the State of Montana did not select the same in accordance with the Statute.
>
> "On the later date, relator filed in the land office perfect application for the land as a homestead which the register and re-

ceiver rejected for the stated reason that, on July 16, 1915, they had permitted one George Kennedy to make a homestead entry on the lands. The permission for the entry of Kennedy rested wholly upon an application made May 25, 1915, at a time when the lands were reserved, as before stated.

"On May 25, 1915, the register and receiver rejected Kennedy's application in the following terms. 'Rejected May 25, 1915, because land not open to entry until July 17, 1915, except to State of Montana and settlers prior to March 10, 1910.'

"On June 4, 1915, the register and receiver made the following notation upon Kennedy's application: 'Suspended June 4, 1915, pending preference right of State of Montana. Rejection of May 25, 1915, hereby revoked.'

"Theretofore it had been the consistent and uniform practice of the General Land Office to reject any and all filings such as Kennedy's.

"Relator appealed from the rejection of his application to the General Land Office, and that office affirmed the decision of the register and receiver, and relator appealed to the Secretary of the Interior, who, on July 28, 1916, affirmed the decision of the General Land Office, and held that Kennedy's application, being prior in time, is also prior in right.

"The Secretary, in his decision, did not refer to any of the asserted prior decisions or practice, but arbitrarily disregarded the

will and mandate of Congress expressed in the act of August 18, 1894.

"Relator, at the moment of the expiration of the sixty day limit, with the intention of making entry thereof under the Homestead Laws, and the right to make such entry for the sixty day period was secured to him by such residence by the provisions of the 3rd section of the Act of May 14, 1880 (21 Stat. at L. 140, Chap. 89, Comp. Stat. 4536, 8 Fed. Stat. Anno. 2nd Ed. p. 597), and the uniform decisions of the Department of the Interior denied to him the exercise and enjoyment of that right. And in ruling that Kennedy had acquired a right under the Homestead Laws, relator is deprived of the benefit to him of performance by the Secretary of the Interior of a purely ministerial duty, and he prays that a writ of mandamus be issued, directed to the Secretary, to approve his, the relator's application, and deliver to him proper evidence thereof. General relief is also prayed.

"An order to show cause against the petition was issued and served on the Secretary, to which he made reply, affirming the legality of the action of the local land office, and the decision of the General Land Office affirming it, and his decision of concurrence.

"He denied that there has been any ruling by the Secretary of the Interior that, during the sixty day period, application for homestead entry must be rejected. Such, however, he admits, may have been the ruling by the local land office, and even by the

Commissioner of the General Land Office, but he states that from August 31, 1910, the construction of the Act was pending before the Secretary upon an appeal from a decision of the Commissioner; that a decision upon said application is reported in 45 Land Dec. 37, under the title of Northern R. R. Co. v. Idaho, dated April 12, 1916, and that he decided that selection during such period should not be rejected, but held suspended until final adjudications of the rights of the State.

"He avers such is the proper construction of the Act, and that the act being one of the land laws of the United States, its construction, as well as the determination of all equitable rights under it, is within the jurisdiction of the Secretary of the Interior so long as the legal title of the land yet remains in the United States, and that it appears on the face of relator's petition that the legal title of the land in controversy is still in the United States and involves the exercise of judgment and discretion, not reviewable by any court on direct proceedings either by mandamus or in equity.

"He prays that the rule to show cause be discharged.

"Relator demurred to the return, and in passing upon it the Court observed that there were two questions in the case: One, whether the facts exhibits a case for mandamus of the Secretary; that is in apparent defiance of the law, acting capriciously or arbitrarily, or beyond the scope of the admin-

istrative authority confided to him; the other, the construction of the Act of 1894.

"To the first question the court answered negatively, and to the second question replied that 'independently of the question of the propriety of reviewing the action of the Secretary of the Interior in the pending case, it would seem that the decision rendered by him was one entirely permissable under the law. The demurrer to the return was therefore overruled. Relator electing to stand upon it, the rule was discharged, and the petition dismissed.

"It is manifest from this statement that the petition presents a controversy over the true construction of the act of 1894. From the Act and the Secretary's decision, it is apparent that the later was not arbitrary or capricious, but rested on a possible construction of the Act, and one that the reported decisions of the land department shows is being applied to other cases. The direction of the act that the lands be reserved' from any adverse appropriation means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view. He could not administer or apply the Act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator is therefore, not entitled to a writ of mandamus."

The law in the foregoing case fits the case at bar

for there is a lack of clarity in the language of the Act of February 8, 1918, as to what appraisement was meant. How then could the Secretary apply the Act without a construction involving the exercise of judgment and discretion? Since there is a lack of clarity in the language of the act as to what is meant by "appraised value" it follows that the view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it.

As far as the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation are concerned it is apparent that this is an attempt to mandamus them in anticipation of an omission of the duty that they have not been called upon to perform. The duty of the executives of the Tribes is to execute patents when the Secretary approves the purchase. It is elementary law that the relator must show a clear legal right before mandamus will be allowed.

II.

The Secretary's construction of the Act of Feb. 8, 1918, is correct.

We urge the above proposition in support of proposition one and contend that under the Act of Feb-8, 1918, relator is not entitled to approval of his proposed purchase at the 1912 valuation. Since the words "appraised value" appearing in Sec. 4 of said act are not clear, the determination of this question depends upon construction. In support of our view we urge: (a) that the Act of 1918 authorized the purchase to be made at a valuation to be fixed by the appraisement of

1918; and (b), that the valuation fixed by the 1912 appraisement is not sufficiently authorized.

A.

We contend that the Act of 1918, authorizes the Secretary to have these lands re-appraised for the purpose of this sale and "the appraised value" means the valuation so fixed. This appears so clear to us that we feel confident that if it were not for the sole fact that the lands had been appraised under the Act of 1912, there would be no question whatever about it. Section 4 specifically provides that the purchase shall be made at "the appraised value," and we think that is sufficient to indicate that Congress intended that a re-appraisement should first be made before the right to purchase was exercised. Unfortunately, however, the Act does not contain a specific provision for an appraisement of the surface as it does in the case of the coal, and no satisfactory explanation can be obtained from the language of the Act itself as to why this was not done, and the absence of such specific authority has afforded ground for the contention that it was not so intended. But we think that a careful consideration of the circumstances under which the statute was made up will show that the absence of more specific authority is not due to any intention of Congress not to have a re-appraisement made but is due to an inadvertance on the part of Congress, caused by the manner in which the provision was made a part of the law.

An examination of the statute and the report of the House Committee on Indian Affairs show quite clearly that it was first intended to authorize a sale of the coal without regard to the surface and later it

was decided to incorporate the provision including the surface, but the language used was not adapted to the change. It appears that the original draft of the statute was designed to authorize a sale of the coal alone, and the title and the main body of the Act are made up of language devoted to that sole accomplishment. But it appears from the report of the Committee which framed the law that after the bill was practically complete in its present form, a representative of the lessees appeared before the committee and proposed a number of saving clauses for their own special benefit, among which was the provision in question. The committee adopted these provisions, but instead of distributing them more appropriately throughout the body of the Act to show more clearly what provisions were modified, they were merely grouped together and inserted in the bill as Section 4. Neither does it appear that the Committee went back and revised the original draft so as to conform to these new provisos, but merely permitted it to remain as it was originally written, consequently discrepancies between that portion of the law contained in the original draft and these new provisions are the result, and it is not unlikely that many would be discovered if questions were raised calling for construction.

Our conclusion is that the failure to provide for a reappraisement in specific terms is due to the fact that after the provision was inserted in Section 4, the Committee did not go back and revise the one authorizing an appraisement of the coal so as to include the surface. This is confirmed by the discrepancy which exists between this very provision and the title of the Act. Al-

though the surface is as important as the coal and demands the same amount of consideration in the enactment of legislation dealing with it, and while the title specifically refers to a sale of the coal, it does not mention the sale of the surface as one of its objects. But it can not be argued that the failure to mention the surface in the title is evidence that Congress did not intend that it should be sold, because it is specifically provided in Section 4 that the lessees shall have a right to purchase, and the only explanation that can be made of the discrepancy is that after Section 4 was written, the Committee did not revise the title to conform to it. Yet, we might as well argue that the failure of the title to mention a sale of the surface is evidence that Congress did not intend a sale as for the lessees to contend that a failure to provide in specific terms for a new appraisement is evidence that one was not intended, because it is specifically provided that the purchase may be made at the appraised value. And the very fact that we are confronted with the question of what Congress intended with the question of what Congress intended by Section 4, is sufficient evidence in itself that the Committee was not as careful as it might have been to revise and harmonize the Act. Because if it had been the intention to sell these lands at the valuation of 1912, and time had been taken to weigh the language used, it would have been readily seen that the language used was not sufficiently clear to grant such authority, or if it was the intention to sell at the 1918 appraisement and time had been taken to carefully consider whether the language used was sufficient for that purpose, it would also have been

readily seen that it was necessary to revise the specific provision authorizing an appraisement of the coal to include the surface.

Due to this anomalous condition which makes apparent discrepancies inevitable, therefore, our only recourse is to resort to a construction of the language as we find it. Let us examine the expression "the appraised value," to see, if we can, what Congress meant by that language. In our examination, we find that Congress has used the same language on two such other occasions as will clearly show what meaning was intended when it was used in this connection. In the very next provision of Section 4, it is further provided, that the lessees "shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction at not less than the appraised value." Section 1 of the Act had made specific provision for a re-appraisement of the coal before it should be offered for sale, and "the appraised value" there referred to unquestionably meant the valuation to be fixed by that appraisement. In Section 2 of the Act of February 19, 1912, (37 Stat. 67), which was also an Act to provide for the sale of the surface of the segregated coal and asphalt lands here in question, provided "That after such classification and appraisement has been made each holder of a coal or asphalt lease shall have a right for sixty days, after notice in writing, to purchase, at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the lands covered by

his lease," etc. Section 1 made specific provision for an appraisement of the lands and Section 2 provided that the purchase should be "after such classification and appraisement," and there is no question here that when Congress used the words "appraised value," it meant the valuation to be fixed thereafter by the appraisement. In Heald, et al., vs. District of Columbia, reported in 254 U. S. 20, 41 Sup. at Rep. 42, 65 Law Ed. 106, the Supreme Court of the United States stated it to be a well settled rule "that where provisions of a statute had, previous to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implications to the contrary." Under this rule, therefore, there being no "plain implications to the contrary," it results that we must give the language "the appraised value" the same meaning which Congress unmistakably gave it on these other two occasions, and hold that it refers to an appraisement to be made.

It is true that in those instances, appraisements were specifically provided for and an appraisement is not so provided for in the case at bar; but that is a fact which is unimportant. In each instance, Congress assumed the existence of sufficient authority for the appraisement and the important thing is what it intended in view of that assumption. The mere fact that it had not specifically provided for the appraisement, as was thought, will make no difference.

As we view this language, therefore, in the light of the entire act, we are compelled to conclude that Congress intended that these lands shoud be sold at a new appraisement. The only thing lacking is more speci-

fic language to that effect, which we think is due to mere inadvertance. Sections 6 and 8 afford ample authority and means for making the new appraisement. In Section 6, it is provided that the Secretary is authorized to "prescribe such rules, regulations, terms and conditions not inconsistent with this act, as he may deem necessary to carry out its provisions." This provision is general in its application to the entire act and its function is to supply the Secretary with the necessary power to carry out the intention of Congress as expressed in the act. Section 8 makes an appropriation of $50,000 out of the Choctaw and Chickasaw tribal funds "to pay expenses of appraisement, advertisement and sale." It is also general in its application, and that authority tc pay out the moneys for appraisement, advertisement and sale applies with as much force to the surface as it does to the coal.

B.

We further contend that without regard to whether the statute does or does not authorize a new appraisement, the 1912 appraisement must, nevertheless, fail because it is not sufficiently authorized. We base this challenge upon the ground that under the rules of construction adopted by the courts, the language used is not sufficient. It is now a well established rule of construction that statutory grants of property, franchises or privileges in which the Government or public has an interest are to be construed strictly in favor of the public, and nothing passes except what is granted in clear and explicit terms. Some of the leading cases are: Coosaw Mining Company vs. State of South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537;

Water Company vs. Knoxville, 200 U. S. 22, 34, 26 Sup. Ct. 224, 54 L. Ed. 353; Blair vs. Chicago, 201 U. S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801; City of Mitchell vs. Dakota Central Telephone Company, 246 U. S. 296, 38 Sup. Ct. 362. Coosaw Mining Company vs. South Carolina, was a suit between the mining company and the state, and the question involved was whether a certain act of the legislature extended the time for removing certain ore deposits from certain river beds in the state, which had been granted the company by a previous act. In holding against the contention of the company, the Supreme Court of the United States, said: "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property franchises, or privileges in which the government or the public has an interest ____. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication." Blair vs. Chicago, was a suit wherein plaintiff in error contended that a certain act of the Illinois legislature extended the time which it had been granted for using certain streets of the city under a previous act. In holding against the contention of plaintiff in error, the same court also said: "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld."

As we understand it, this is a special rule of construction which the courts have seen fit, for good rea-

son, to apply in cases where statutes granting property, franchises or privileges are construed, and it is distinguished from the general rule of construction which we have heretofore invoked in favor of a new appraisement by the nature of the benefits derived. In the one case, the benefits are for the public good and in the other, they are for private gain. But the difference between these two rules of construction is so ably discussed and clearly explained by the Supreme Court of Connecticutt in Bradle vs. N. Y. and N. H. R. R. Company, 21 Conn. 294, 306, that we will be content to rest our conclusion in this respect upon the able reasoning of that court without further comment. The material portion of the Court's opinion reads as follows: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted, the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the state or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled.

Acts of the former kind being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that their interests might be promoted at the sacrifice or to the injury of those or others whose interests should be equally regarded. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others." (See also Cooley's Constitutional Limitations, 7th Ed. p. 565.)

As we interpret the various expressions of the courts, this rule requires that statutes of this character contain not only a clear expression of the legislative intent, but also that the terms of the grant be expressed in unmistakable language. The language is the thing of first importance. The reasons which

prompted its establishment will justify no other conclusion. There are others, of course, but its principal purpose is to act as a safeguard against the exploitation of public property by unfair means. As was said by court in Blair vs. Chicago, supra, "It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privilege which they are willing to give." And the opportunity for obtaining from the legislative bodies a more liberal grant than they are willing to give, by the skilful use of language, is so great that the public interest demands that the courts exercise the utmost care to see that those bodies are fairly dealt with. In Pennsylvania Railroad Company vs. Canal Commissioner, 21 Pa. 9, 22, Chief Justice Black in speaking of it for the Supreme Court of the State of Pennsylvania, said that "words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactment of the legislature." (See also Blair vs. Chicago, supra) In Slidell vs. Grandjean, 111 U. S. 412, 23 L. Ed. 321, 330, the Supreme Court of the United States said that the wisdom of the doctrine was that "it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and this sanctions only open dealing with legislative bodies." (See also Coosaw Mining Company vs. State of South Carolina, supra.) The reasoning of the various courts are summed up in Note 1, 36 Cyc. 1177, as follows: "The reason assigned for the

rule is that the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or his agents, and therefore hte words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to secure what could not be obtained in clear and express terms."

The only means the courts have for ascertaining whether the legislature has been dealt with fairly in any particular statute is by an examination of the language there used. If it be clear, the court can not do otherwise than presume that the legislature understood and intended what is so expressed. But if the language is not clear and susceptible to more than one construction, it can not presume that the legislature meant one any more than it meant the other. In such an event, the court will not take anything for granted which is against the public interest. The public interest being involved, it will, in the exercise of great care, resolve the doubt which may exist in favor of the public. Otherwise, it might adopt a construction which was not intended and enable a perversion of the legislative will to the great detriment of the public. This view is confirmed by the following language used in Coosaw Mining Company vs. State of South Carolina, supra, where the statute being construed was susceptible to either of two constructions, one of which was favorable and the other unfavorable to the State, as follows: "If the Act of 1876 is fairly susceptible of either of the constructions we have indicated, as we

think it is, the interpretation must be adopted which is most favorable to the State."

With this rule clearly before the court, we feel it hardly necessary to say more. The mere fact alone that this statute is now before this court for construction because the Secretary of the Interior has refused to adopt the 1912 appraisement, is sufficient evidence of its deficiency. The Secretary, to whose able judgment the lessees appealed for an approval of their proposed purchases, after the most careful consideration of the question on two occasions, has held that the 1912 appraisement is not the one authorized. The Secretary might have been wrong, it is true, but his decision should at least be sufficient to convince any reasonable man that htere is no doubt from the language whether the 1912 appraisement is authorized. And a casual examination of the language used in the statute shows that the Secretary was not only justified in his conclusion but in all probability correct. In order, however, that the court may thoroughly understand, our view, we invite attention to a more careful application of the rule to the facts. We will discuss the question in the nature of an inquiry into three propositions: First, whether this is a statute which grants property, franchises, or privileges; Second, whether the Government or public has an interest in the property, franchises, or privileges granted; and Third, whether the language used is sufficiently clear.

(1) That the statute is one which grants property, franchises or privileges, seems sufficiently clear to us without argument. It authorizes the lessees to buy these lands at the appraised value, whatever that

may be. There is no other authority for the purchase of these lands by any one else and the privilege extended to the lessees is one which they may or may not exercise, in their discretion, without competition. If it be held that the valuation is to be based on the 1912 appraisement, they will be accorded the additional privilege of buying them at about half what they are actually worth as shown by the 1918 appraisement. In City of Mitchell vs. Dakota Central Telephone Company, supra. the privilege sought was an extension of time to use the streets of the city for a certain telephone system. In Coosaw Mining Company vs. State of South Carolina the privilege in question was an extension of time to remove certain ore deposits from certain river beds in the State. In Blair vs. Chicago, the privilege claimed was an extension of time to use certain streets of the city for a street railway system. In the case at bar, the privilege contended for is the right to purchase the lands at less than their actual value. We see no difference in the analogy of those cases and the one at bar, unless it be to make the right to acquire something for nothing the greater.

(2) That a right to buy these lands at less than their actual value is one in which the public and Government have an interest, seems equally clear, and the proposition will be submitted without extensive comment. These lands belong to the Choctaw and Chickasaw Nations of Indians. Under the law, the Government manages their entire estate for them as their guardian. The Government and public, therefore, are

vitally concerned in whether the property is properly disposed of.

(3) This brings us now to a consideration of the one vital question as to whether the right to purchase at the 1912 valuation is granted in sufficiently clear and explicit terms. In Coosaw Mining Company, vs. State of South Carolina, supra, it is said that "only that which is granted in clear and explicit terms passes" -------- "and whatever is not unequivocally granted is withheld. Nothing passes by mere implication," and in Blair vs. Chicago, it is said that it must be "in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import." The only language which might be construed to grant such a right is contained in the single provision of Section 4, which merely provides that the lessees may purchase the lands at "the appraised value," and the simple question is whether that expression so clearly refers to the 1912 valuation as to exclude any doubt. We have heretofore, expressed the view that instead of authorizing a sale at the 1912 valuation the statute provides that the sale shall be made at the new valuation, and deem it unnecessary to reiterate what we have already said on that point. Suffice it to say that without regard to whether the point is well taken, it is sufficiently meritorious to raise the necessary doubt to mullify the 1912 valuation, and the fact that it is confirmed by the decision of the Secretary and the decision of the Supreme Court of the District of Columbia shows that it is not without respectable support.

We think that the Secretary's construction is a

fair test of the sufficiency. It appears that before any question was raised involving the meaning of the language, the Secretary interpreted it to authorize him to make a new appraisement, (1918 appraisement) and on the strength of that opinion spent the moneys belonging to the Choctaw and Chickasaw Nations in making one. This may be accepted as a fair indication of the natural import of the language used in every day business. Moreover, after the issues were joined and it became necessary for the Secretary to render final decision as to whether he would not approve the schedule of proposed purchases submitted, and after hearing oral arguments, considering written briefs and being fully advised in the matter, he sustained his first view by refusing to approve the schedule of purchases submitted. And not being satisfied with that decision, the lessees appealed for a rehearing which was granted, and again after the matter was thoroughly reconsidered the secretary refused to reverse his former decision. And this is a fair indication of the natural import of the language when viewed with the utmost deliberation. We know of no fairer test that may be applied and if the natural import of that language appeared to the Secretary to favor a new appraisement, both as a business and a jurist, it must be at least sufficient to create in the minds of Congress and business men in general, a very grave doubt as to whether its natural import is in favor of the appraisement of 1912.

The only theory that will permit the language to be construed in favor of the 1912 appraisement is that the word "appraised" must be applied in its past tense as of the date of the passage of the law. If that were

clear it would naturally follow that the 1912 appraisement was intended, because the appraisement of 1918 was not then in existence. We have already called attention to the fact that Congress used the same lands under the Act of 1912, with the clear meaning that a future appraisement was referred to, and we deem it unnecessary to enter into any further discussion of that one phase, except to add herein that the reason for using that language was because its sole purpose was merely to fix the price at which the coal deposits and lands should be purchased, and until the lessees applied for purchase its place in the law was unimportant. According to the precedents there laid down by Congress, and there being no clear implication to the contrary, it must be held that Congress intended that the word should be applied in its past tense as of the date of the sale. As in the sale of the coal and the surface, under another law, the word is of no importance until that time arrives and Congress could not have had any other purpose in mind before then.

With these observations, we deem it unnecessary to pursue the inquiry further. It appears in the final analysis that the language is reasonably susceptible to either of two constructions: First, that the old appraised value was intended, and Second, that the new one was intended. In the first case, the lessees would get something for nothing and the Indian wards of the Government will suffer the loss; and in the second, the lessees would pay what the lands are actually worth as shown by the appraisement, and no one will be the loser. The Supreme Court of the United States, in Coosaw Mining Company vs. State of South Carolina,

supra. heretofore quoted, has said that in such an event, "the interpretation must be adopted which is most favorable to the State."

This conclusion is further supported by another well established rule of construction which requires that in construing statutes, passed for the benefit of defendant Indian tribes, all doubtful expressions be resolved in favor of the Indians. In Alaska Pacific Fisheries, vs. United States, 248 U. S. 87, 63 L. Ed. 138, the Supreme Court of the United States said: "This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. Choate v. Trapp, 224 U. S. 665, 675, 56 L. Ed. 941, 945, 32 Sup. Ct. Rep. 565, and cases cited." The case of Choate vs. Trapp, cited, involved the taxability of alloted lands belonging to the Choctaw and Chickasaw Indians in Oklahoma, which has previously belonged to the two Nations in common with the same lands now in question, and the decision of the Court in htat case sets at rest any question which might be urged as to whether the rule is here applicable.

Perhaps the most beneficial service rendered by a careful consideration of this question is to emphasize the wisdom of the rule of strict construction which we have invoked. We have heard able counsel, with all the power they possess, that the mining lessees have the right to purchase about 30,000 acres of land belonging to the Indian wards of the Government, at about half of what the lands are actually worth, under a statute which was passed by the legislative branch of

the Government which is the guardian of these wards. The privilege is claimed under a statute which ambiguous, but it is not mentioned in the title of the act, and there is no provision in the entire statute which will explain away the ambiguity in its favor. On the other hand the language used is susceptible to another construction by which they would be denied the privilege without injury, and the Indian wards would be saved from a sacrifice of property. It further appears, however, that the lessees wrote it for their own benefit and it was made a part of the law at their request. Without charging that they so framed the language for the purpose of taking any undue advantage, it is patent that great opportunity was thereby afforded for a misunderstanding by Congress of such import of the language to the great detriment of the Government. And as was suggested by the Court in Blair vs. Chicago, supra, "it may be that the very ambiguity of the act was the means of securing its passage." It is possible and not improbable that some member of Congress voted for it without any knowledge that the lessees intended by it to acquire the lands at an unusual price and with the understanding that they would pay what they were actually worth.

If the lessees had in mind buying these lands at the old valuation when they drafted this provision and had it put into the law, we do not challenge their motive in using such ambiguous language for that purpose, but we do condemn the practice as being in violation of the fundamental principle of fair dealing emphasized by the courts. It is a matter of common knowledge that they are always represented by able

counsel, who are quite careful in looking after their own interests. I need do no more than cite the court to the beneficial saving clauses which comprise Section 4, and were adopted at their request, for proof. It must be presumed that they were familiar with the rule of construction which requires that the privileges they sought be granted in clear and explicit terms, and it was their duty to write the grant in clear and unmistakable terms so that the courts might know what Congress intended, without the aid of construction, and so that there might be no doubt as to whether Congress was dealt with fairly. If they chose to do otherwise they did so at their own peril and it is they who must now suffer the disappointment.

But, it is asserted, the Chairman of the House Committee on Indian Affairs stated that the old appraisement was intended, during consideration of the bill by the House, and it is so contended that the construction which he placed upon the statute should be followed by this court. To which we reply that that is a matter outside the record and this court will not travel outside the record to ascertain the intention of Congress in cases of this character. We admit that as a general rule, statements made by chairmen of legislative committees during consideration of bills, in the nature of supplementary reports, may be referred to by the Courts, along with certain other facts and circumstances, to ascertain the intention of the legislature. But under the rule here invoked, the language used presents the question at issue and ,it matters not what Congress intended, if it did not use sufficient language to comply with the rule, the law must fail.

The court will look to the record alone as made by Congress in the make-up of the law for the evidence. The case of Blair vs. Chicago, is a case which clearly illustrates this view. In construing the statute there invoked, the court found that it was susceptible to either one of two constructions, and that on a previous occasion the Governor of the State had vetoed the law upon the ground that it granted the privilege contended for by its proponents. It was there contended also that the Governor's construction should be considered. The court, however, refused to construction placed upon it by the chief executive, upon the ground that the grant was not contained in sufficient language. In refusing to follow it, the court said: "It is true that Governor Oglesby, in his message returning this act with his veto, gave it a construction which would maintain the right to use the streets for the period of ninety-nine years. -------- But, as we have said, the act upon its face is ambiguous and uncertain. We must judge of it by the terms in which it is expressed."

But, aside from its admissability as a matter of law, we submit that the statement made by the Chairman should not be persuasive with this court for reasons apparent on its face. To merit consideration by a court of justice precedents of any nature should be based upon sound reasons. But that can not be said of the statements in this case. In order that the court may fully understand what was said by the Chairman, we quote a portion of a colloquy between him and Congressman Lenroot, as the same is between him and Con-

gressional Record of December 5, 1917, page 46, as follows:

> "Mr. Lenroot. The only reason why the Lessees could not purchase was that it had been withdrawn?
>
> Mr. Carter of Oklahoma. The law gave him the right to purchase it at the appraised value, but he evidently thought it had been appraised too high. This continues the right to purchase at the appraised value given in the act of 1912.
>
> Mr. Lenroot. It does not change the existing law in any particular?
>
> Mr. Carter of Oklahoma. I do not think so.
>
> Mr. Lenroot. Then what was the purpose of putting it in?
>
> Mr. Carter of Oklahoma. It was put in there as a matter of abundant caution so that nothing in this law would repeal the right of the lessees to purchase that land."

The Chairman stated that this provision continued in force a right which the lessees had to purchase these lands at the valuation made under the Act of 1912; that in his opinion, it did not change the existing law in any particular; and that it was put in there as a matter of abundant caution so that nothing in the law would repeal the right of the lessees to purchase the lands. Apparently the Chairman was laboring under the impression that the lessees still had a right to buy the lands at the old appraisement and that this provision was necessary only for the purpose of protecting that right. An examination of the said act of

February 19, 1912, however, shows that this impression was erroneous. Section 2, of that act, provides "that after such classification and appraisement has been made each holder of a coal or asphalt lease shall have the right for 60 days, after notice in writing, to purchase at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease," etc., and it is apparent that that right had long since expired.

The only purpose these statements can possibly serve is to add to the confusion and uncertainty already existing, and to further illustrate the necessity of rules which insure that legislative bodies thoroughly understand legislation of this character. It appears that Mr. Lenroot was seeking information as to why such a provision should be put into the law evidently for the purpose of ascertaining whether he should or should not support it. It is reasonable to conclude that if he did vote for the Act with the provision in it, he voted for it under the belief that these lessees had a vested right which Congress was bound to protect, and it is extremely doubtful whether he, the Chairman of the Committee or any other member of Congress would have supported a provision of law authorizing the lessees to purchase the lands of these Indian wards of the Government at less than half their actual value had they not believed that it was necessary to protect vested rights.

It is therefore respectfully submitted that this is not a case for mandamus and that the judgment of

the Supreme Court of the District of Columbia is right and should be upheld.

G. G. McVAY,
Chickasaw National Attorney.

E. O. CLARK,
Choctaw National Attorney.

By G. G. McVAY,
Chickasaw National Attorney.

March, 1923.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HUBERT WORK, *Secretary of the Interior*, DOUGLAS H. JOHNSON, *Governor of the Chickasaw Nation*, et al., Plaintiffs in Error,

v.

THE UNITED STATES EX REL. MCALESTER-EDWARDS COAL COMPANY.

No. 258.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The McAlester-Edwards Coal Company is a lessee, under leases approved by the Secretary of the Interior, of coal lands in Pittsburg County, Oklahoma, belonging to the Choctaw and Chickasaw Nations.

By the Act of February 19, 1912, c. 46, 37 Stat. 67, the Secretary of the Interior was authorized to appraise and sell at not less than the appraised value the surface of leased and unleased lands of the Choctaw and Chickasaw Nations (§ 1), and in § 2 of that act a preference right for sixty

days after notice, was given to each lessee to purchase a sufficient amount of the surface lands covered by his lease to embrace his improvements actually used in present, or necessary for future, mining operations, up to five per cent of the surface. There was a further provision that this limitation of acreage might, in the Secretary's discretion be increased to ten per cent. It was also provided that upon failure to purchase under this preference right, the Secretary, in his discretion and with the consent of the lessee, might designate and reserve from sale such tracts as he might deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations under any existing lease, and dispose of the remaining portion of the surface.

The McAlester-Edwards Coal Company did not avail itself of this preference right of purchase, and thereafter the Secretary set aside for its use in its operations about 630 acres of surface lands. (R. 5, 6.)

The Act of February 8, 1918, c. 12, 40 Stat. 433, authorized the Secretary of the Interior to sell the coal and asphalt deposits in the segregated mineral area of the Choctaw and Chickasaw Nations, and directed as a preliminary to such sale an appraisal of such deposits to be completed within six months after the passage of the act. The sale was to be had not later than six months from the final appraisement, except as to isolated tracts. §§ 1, 2.

Section 4 declared all sales under the act should be subject to the rights of lessees, and further provided that—

> any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided.

Availing itself of the preference right thus given, the coal company made a first payment for this surface area, and later tendered the balance, which was refused by the Secretary for the reason that the price at which the company sought to purchase the land was the price fixed under the appraisal made under the act of 1912, and that a subsequent appraisal had fixed the value at about double. This appraisal was made under the authority which the Secretary considered was granted or contemplated by the act of 1918.

Upon the theory that this action of the Secretary in refusing to permit the consummation of the purchase was arbitrary, the coal company brought a proceeding in mandamus in the Supreme Court of the District of Columbia to compel the acceptance of the money tendered and the issuance to it of a patent for the lands.

The answer of the Secretary (R. 24–26) admitted most of the *facts* set up in the petition, which have been substantially narrated above, and averred that pursuant to the Act of February 8, 1918, and under rules and regulations prescribed by him, the Secretary had caused an appraisement to be made of the lands involved; that he had construed the act of 1918 as authorizing a new appraisement; and that the company was entitled to purchase under that act only, and at the price fixed by that appraisement.

There was a demurrer to this answer, and the point presented thereby was that the act of 1918 contemplated the sale of the surface at the 1912 appraisal and did not authorize any further appraisal. (R. 27, 28.)

The demurrer was overruled, and, the petitioner electing to stand upon it, judgment was entered dismissing the petition. (R. 35.)

The opinion of the District Court, R. 28.

An appeal was taken to the Court of Appeals, where the judgment was reversed (the Chief Justice dissenting), 277 Fed. 573. (R. 37.) The writ of error sued out by the defendants in the court below brings the cause to this court.

ASSIGNMENTS OF ERROR.

The assignments of error are:

1. The court erred in reversing the judgment below denying the writ of mandamus and dismissing the petition.

2. The court erred in taking jurisdiction to review the Secretary of the Interior in his judgment as to the proper construction of the Act of February 8, 1918, a statute which it was his duty to administer, and to require the substitution of the court's view of the construction of the said statute for his own.

3. The court erred in holding that the Act of February 8, 1918, required the sale of the land involved at a price fixed by appraisement made under the Act of February 19, 1912, and did not authorize the Secretary of the Interior to cause a new appraisement to be made or to sell under such new appraisal.

4. The court erred in denying the existence of the Secretary's power or duty to order a new appraisement under the condition shown by the record and the existence of his power and duty to refuse issue of patent unless and until the amount of the appraised value of the land, as ascertained by him, had been paid.

5. The court erred in holding that, on the record, only a purely ministerial act on the Secretary's part was involved.

6. The court erred in holding that unless the writ of mandamus issue the appellant company would be left without an adequate remedy to enforce its rights.

7. The court erred in holding that the appellant company was entitled to a writ of mandamus.

8. The court erred in not affirming the judgment of the trial court.

The action of the Secretary of the Interior in refusing to sell the land on the terms offered was in the exercise of judgment and discretion in a matter within his jurisdiction, and is not reviewable by the courts in a mandamus proceeding.

The Act of February 8, 1918, *supra*, imposed upon the Secretary of the Interior the duty of selling these lands. To do that, it was necessary for him to consider the provisions of the act of Congress which had placed that duty upon him. As to these surface lands, the act required their sale "at the appraised value" to the holder of the lease of the underlying deposits if the latter applied therefor within the time fixed.

The Secretary, viewing the entire act, decided that he was authorized to make a further appraisement of these surface lands, as he was authorized and directed to do of the coal and asphalt deposits.

Now we say that such a construction was at least a permissible one. As a matter of fact, the Justice of the Supreme Court of the District of Columbia who heard the case in the first instance stated in his memorandum opinion (R. 28) that the Secretary's construction was a permissible one and that he was of opinion that there was nothing arbitrary or capricious in it. In the Court of Appeals, the Chief Justice dissented, and we think we may properly infer that he likewise held the construction placed upon the act by the Secretary as at least a possible one.

The very fact that these two Justices' views are opposed by the two Justices of the Court of Appeals, whose judgment controlled in that court, make more pointed the fact that the Secretary's construction was not arbitrary.

In this situation the applicable rule is well settled, that where it is the result of the exercise of judgment and discretion, the action of an executive officer is impregnable to mandamus.

The court will not determine in such a proceeding whether the construction given a law by an executive officer is the correct one, nor will it substitute its judgment for that of the officer. *Ness* v. *Fisher*, 223 U. S. 683; *Knight* v. *Lane*, 228 U. S. 6.

As Mr. Justice McKenna well said: "Where there is discretion * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555.

The language used in the opinion in *Hall* v. *Payne*, 254 U. S. 343, is particularly apt in this case. Speaking of the act there in question and of the Secretary's construction of it, it was said (p. 347):

> He could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

The Secretary's construction of the act of 1918 was an entirely reasonable one. It will be observed that §4, in granting the preference right to purchase surface lands, made no reference to the act of February 19, 1912, *supra*. Indeed that act is not mentioned in the act of 1918. The latter act designated the price at which the lands were to be sold as "the appraised value." Clearly there was nothing in the language of that act which would give any indication that "the appraised value" meant the appraisal made under the act of 1912. Standing alone, the statute gives no basis for such a construction. To sustain that construction, it is necessary to import into the statute additional words. Had Congress meant "the appraised value" to be the appraisal under the act of 1912, what could have been more easy than to have said so?

As Congress did not refer to the appraisal under the act of 1912, and as no specific appraisal was mentioned, it was not unnatural that the act be considered to contemplate and authorize an appraisal to determine the value of the lands at a time when they were to be sold rather than to adopt an appraisal made a number of years previous.

The record shows that the value of the lands here involved was fixed by the appraisal under the act of 1912 at $9,050.53, while by the 1918 appraisal the value is more than double that figure, $20,482.60. It therefore was entirely proper and sensible for the Secretary to adopt a construction that would not

impute to Congress an intention to sanction an unbusinesslike plan.

Again, the lands involved were not public lands of the United States; they were lands belonging to the Choctaw and Chickasaw Tribes of Indians. The United States, in selling the lands, was acting as trustee for its Indian wards. It would indeed be poorly discharging its obligation as such trustee to permit its wards' lands to be purchased at a price representing only half their value.

It has been the rule of this court that treaties and legislation relating to and affecting the Indians and their rights are to be construed most favorably to them. *Choate* v. *Trapp*, 224 U. S. 665, 675; *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89. Therefore the Secretary was right in considering the act of Congress in the light of that rule and that policy.

Moreover, it is important to note that the Act of 1918, §4, required that the preference right to purchase surface lands be exercised "within ninety days after the approval of the completion of the appraisement of the minerals as herein provided." The appraisement of the minerals was to be completed within six months after the passage of the act, and the sale of the minerals was to be had not later than six months from the final appraisement. §§1 and 2.

Now, if the surface was to be sold under the 1912 appraisal, what was the reason for delaying the sale until after the appraisal of the minerals had been made?

To conclude, the construction given the act by the Secretary was warranted by the terms and language of the act; it is consistent with sound business principles, and does justice to the Indian wards of the government who, as such and as owners of the lands involved, are entitled to a construction most favorable to their interests.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals was wrong and should be reversed, and that the judgment of the Supreme Court of the District of Columbia should be affirmed.

JAMES M. BECK,
Solicitor General.

WILLIAM D. RITER,
Assistant Attorney General.

H. L. UNDERWOOD,
Attorney.

MARCH, 1923.

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No. 258.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

HUBERT WORK, SECRETARY OF THE INTERIOR, ET AL.,

vs.

THE UNITED STATES, EX REL., MCALESTER-EDWARDS COAL COMPANY, A CORPORATION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE M. PORTER,
JOHN L. FULLER,
JAMES W. BELLER,
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Attorneys for Defendant in Error.

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LIST OF CASES.

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BRIEF FOR DEFENDANT IN ERROR.

The defendant in error, the McAlester-Edwards Coal Company, hereinafter referred to as the Coal Company, filed a petition in the Supreme Court of the District of Columbia praying a Writ of Mandamus directed to the Secretary of the Interior and to the Governor of the Chickasaw Nation and the Principal

Chief of the Choctaw Nation, commanding the Secretary to accept the purchase price tendered by defendant in error in payment for certain described areas of surface lands to which it had the preferential right to purchase under the Acts of Congress referred to in the petition, and commanding the Governor of the Chickasaw Nation and the Principal Chief of the Choctaw Nation to deliver to it patent evidencing the sale and conveyance of all right, title, estate and interest of the Choctaw and Chickasaw Nations of Indians to the surface of the said lands.

The answer of the plaintiffs in error admitted all of the material facts set forth in the petition, but denied the right of the Coal Company to the relief prayed for on the ground that it did not have the preferential right to purchase this surface land at the appraisement made by authority of Congress in 1912, as was contended, and asserted that the construction placed by the Secretary of the Interior upon the Act of 1918, hereinafter referred to, was not arbitrary and capricious, but involved a discretion which could not be controlled or directed by mandamus. A demurrer to this answer was overruled by the Supreme Court of the District of Columbia, and final judgment was entered therein dismissing the petition. (R. 35.)

An appeal was taken to the Court of Appeals of the District of Columbia, and the judgment of the lower court was reversed (R., 37), whereupon a Writ of Error was sued out by the defendant in the court below bringing the cause to this court.

ARGUMENT.

The question before this court is of necessity a very narrow one. If the meaning of the Act of Congress and the intent of Congress be so plain upon the face of the Act itself, when read in connection with the antecedent statute in *pari materia,* that it is susceptible of but one reasonable interpretation, then, and in that event, if the duty laid upon the Secretary of the Interior be plain and unmistakable and of a ministerial character, the Writ of Mandamus will lie to compel him to act in accordance with the directions of the statute.

The Acts of Congress necessary to be examined by the Court are the Act of February 19, 1912 (37 Stats. L., 67) entitled "An Act to Provide for the Sale of the Surface of the Segregated Coal and Asphalt Lands of the Choctaw and Chickasaw Nations and for Other Purposes," and the Act of Congress of February 8, 1918 (40 Stats. L., 433) entitled "An Act Providing for the Sale of the Coal and Asphalt Deposits in the Segregated Mineral Land in the Choctaw and Chickasaw Nations, Oklahoma." Both of these Acts were passed in pursuance of and supplemental to the agreements and treaties entered into between the United States and these Indian Tribes.

Under what was known as the Atoka Agreement approved by Congress by the Act of January 28, 1898 (30 Stats. L., 495), ratified August 24, 1918, it was provided in substance for the surveying and allotting of the lands belonging to the Choctaw and Chickasaw Nations, which theretofore had been held by them in common, and further provided that before allotments were made all that portion of the land which was un-

derlaid with coal and asphalt belonging to those Tribes should be segregated and sold and the money derived from the sale of such lands pro-rated among the allottees of said Tribes; and it was also provided that pending the sale these coal deposits should be leased and the royalties pro-rated among said allottees.

The leases granted to the Coal Company were executed under the provision of this law, were of a duration of thirty (30) years, expiring about 1929, and permitted the lessee the use of the surface of the land covered by the lease for the purposes of developing its coal mines.

The Act of February 19, 1912, above referred to, authorized the Secretary of the Interior to sell the *surface*, leased and unleased, of said Indian lands which had been already segregated and reserved by the order of the Secretary of the Interior dated March 24, 1903, as authorized by the Act of Congress approved July 1, 1902, and the surface authorized to be sold included the entire estate of the Indians in this land save the coal and asphalt reserved. The Secretary of the Interior was required to classify and appraise the surface so to be sold, and the Act further provided for the protection of the existing coal lessees, as follows:

> "Sec. 2. That after such classification and appraisement has been made each holder of a coal or asphalt lease shall have a right for 60 days, after notice in writing, *to purchase at the appraised value* and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up

to 5 per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be approved by the Secretary of the Interior; provided, that the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lease to not more than 10 per centum of the surface; provided further, that such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved; provided further, that if any lessee shall fail to apply to purchase under the provisions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved."

Pursuant to this Act of 1912, the Secretary of the Interior did classify and appraise the surface of this segregated land, which included the lease held by the Coal Company; but by reason of the division of this land into sub-divisions, and the provision that a lessee could only purchase according to such sub-division, it was found that the 10 per cent provided for in said Act of Congress, when applied to these sub-divisions, was not sufficient for the present and future operations of said lessees, and thereupon a reservation was

made by the Secretary of the Interior with the consent of the lessee according to the last provision of Section 2.

Inasmuch as the right of the coal lessees to purchase the necessary surface under the provisions of the Act of 1912, could not be exercised for the reason aforesaid, Congress, by the Act of 1918, above referred to, renewed the preferential right of these lessees to purchase the surface necessary for present and future operations according to said subdivisions by specific enactment, in the following words:

> "That any lessee shall have the preferential right, provided the same is exercised within 90 days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him heretofore reserved by order of the Secretary of the Interior."

When this provision was under discussion in the House of Representatives, the following colloquy occurred between Representative Lenroot and Honorable Charles Carter of Oklahoma, Chairman of the House Committee on Indian Affairs in charge of the bill, himself a member of the Choctaw Tribe of Indians (Cong. Rec., Vol. 56, Pt. 1, 65th Congress, 2nd Sess., p. 44):

> "Mr. Carter of Oklahoma. Practically all of it is sold.
>
> Mr. Lenroot. I call the attention of the gentleman to page 4, beginning with line 16 of the bill, to this langauage:

'That any lessee shall have the preferential right, provided the same is exercised within 90 days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any and all of the surface of the land lying within such lease—'

and so forth.

Mr. Carter of Oklahoma. When I answered the gentleman's question I meant all had been sold that was subject to sale. There was some set aside which the operator might need for the operation of the mines.

Mr. Lenroot. They were appraised, but not sold?

Mr. Carter of Oklahoma. They were not offered for sale.

Mr. Lenroot. Is the appraised value here—the old appraised value?

Mr. Carter of Oklahoma. No. It was the appraisement made in 1912.

Mr. Lenroot. Under the surface act?

Mr. Carter of Oklahoma. Yes. This appraised value was made at the same appraisement as that at which the land had recently been sold.

Mr. Lenroot. The only reason why the lessee could not purchase it was that it had been withdrawn?

Mr. Carter of Oklahoma. The law gave him the right to purchase it at the appraised value, but he evidently thought it had been appraised too high. *This continues the right to purchase at the appraised value given in the Act of 1912.*

Mr. Lenroot. It does not change the existing law in any particular?

Mr. Carter of Oklahoma. I do not think so.

Mr. Lenroot. Then what was the purpose of putting it in?

Mr. Carter of Oklahoma. It was put in there as a matter of abundant caution, so that nothing in this law would repeal the right of the lessee to purchase that land."

This résumé of these two Acts of Congress, which must be considered *in pari materia,* and the discussion in the House of Representatives, and the reasons given by the Chairman of the Committee in charge of the bill for the particular enactment referred to present to this Court the remarkable anomaly of Congress "as a matter of abundant caution," attempting by specific provision to remove any possible ambiguity as to the preferential right of these lessees to purchase the surface at a price theretofore fixed and determined by an appraisement previously made, and the Interior Department denying this right by refusing to follow the plain commands of Congress.

It is the contention of the Coal Company that no normal, fair and reasonable mind can place any other construction upon the Act of 1918, when read in connection with the Act of 1912, to which it is supplemen-

tary, and reach a conclusion other than that it was the direct, plain, specific and unmistakable intention of Congress to vest in these lessees this preferential right to purchase for a limited time, at the then existing appraised price as determined under the Act of 1912. The Act of 1912 provided for the appraisement of these lands, and such appraisement was made in accordance with the law and had become an official record of the Interior Department. It was an existing fact. It was the only appraisal in existence when the Act of 1918 was passed. No appraisal whatever of this surface was provided for by the Act of 1918. The Secretary of the Interior was given under it no authority to either classify or to re-appraise. No appropriation was made for this purpose, and not only a new appraisement but all of the necessary incidents thereto must be inserted bodily into the statute by an effort of the imagination in order to reach the conclusion that it was the intention of Congress that a new appraisement was to be made. Such a construction of the Act does violence to the very words of the statute, and is so plainly opposed to the manifest intention of Congress as to make it essentially arbitrary and legally impossible.

It is a significant fact that there appeared to be no doubt in the mind of the Secretary of the Interior as to the exact intent of Congress and of the statute when it first came before him for consideration, for on November 8, 1918, the Coal Company undertook to exercise its preferential right, granted by the Act of that year, to purchase the surface of said lands which it was entitled to purchase, and made a payment on account thereof at the price fixed by the appraisement made under the Act of 1912; and the Secretary of the Inte-

rior caused the Coal Company to be informed under date of November 20, 1918, that its purchase would be based upon the appraisement of 1912, wiring it as follows (the original of which was presented to the Trial Court without objection, and the correctness of which was not denied):

"Muskogee, Oklahoma, 558P Nov. 20, 1918.

F. B. DREW,
Mgr. McAlester-Edwards Coal Co.,
McAlester, Oklahoma.

Secretary Interior holds nineteen twelve appraisement applies sale surface heretofore reserved by lessees. Preferential right of lessees to purchase expires Nov. twenty-sixth. Deposit payment here.

PARKER."

It is evident that the Secretary at that time, November 20, 1918, just six days prior to the expiration of the 90 days provided by law within which the preferential right must be exercised, had no doubt as to the intention of Congress or the meaning of the Act. It was only because of this first construction of the Act by the Secretary that the Coal Company made the first and second payments, went into possession of the surface of said land as purchaser and made large investments in improvements thereon. The payments were received and retained by the Secretary for fourteen months. As a matter of fact the Coal Company was not notified of the second appraisement until more than "90 days after the approval of the completion of the appraisement of the minerals," as provided in the Act of 1918. Thus this arbitrary action of the Secretary, if sustained by the Court, would destroy a specific right clearly given by an Act of Congress—the

preferential right of the Coal Company to purchase the surface which had been theretofore reserved to it by the Secretary of the Interior, upon which surface, it is admitted by the pleadings, the appellant had a valid lease for many years to come, being also the owner of the coal under said surface.

The preferential right of all lessees to purchase this surface expired ninety days after the approval of the appraisement of the coal, to wit, on the 26th day of November, 1918. It was incumbent upon the Secretary of the Interior to advise the lessees of this expiration date, and then it was incumbent upon the lessees who desired to purchase this surface to make within the ninety days the partial payment required under the law. The ninety-day time limit fixed by Congress within which the right could be exercised was binding upon both the Secretary and the lessees.

Neither the lessees nor the Secretary could exercise any discretion as to this ninety-day limit thus fixed by Congress. The Secretary had no more power to accept a payment under this new appraisement at the time the Coal Company's money was returned and it notified that such new appraisement had been made, than would a purchaser have the right to now demand that he be permitted to make his first payment under the Act of 1912.

We again call attention to the clause of the Act of 1918 upon which we rely:

> *"Any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals, as herein provided, to purchase at the appraised value any and all of the*

surface of the land lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior."

Under this clause there were certain facts for the Secretary to ascertain and all were matters of record in his Department:

First: He must ascertain that the parties seeking this preferential right were holders of a valid lease;

Second: That the surface sought to be purchased had been reserved and approved by the Secretary;

Third: That the appraisement of the minerals had been completed and approved by the Secretary;

Fourth: That the application to purchase was made within ninety days after such approval.

These were the facts and the only facts for the Secretary to ascertain and were all found by him in favor of the appellant, as admitted by the answer filed in this case.

In order to enable the lessee to perfect his purchase it only remained for him to ascertain the amount of the "appraised value of the tract sought to be purchased," fixed by Congress to be the appraisement already existing under the Act of 1912, which appraisement had been for four (4) years a matter of record in the Interior Department, and make payment, as was done by the coal company, in accordance with such appraisement and under the express directions of the Secretary. This is recited in the petition and admitted in the answer.

Section 7 of the Act of 1918 provided:

> "That when the full purchase price for any property sold hereunder is paid, the chief executives of the two Tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent, conveying to the purchaser the property so sold * * *."

Of course, "with the approval of the Secretary of the Interior" of the deed could mean nothing more than his approval of the form of the deed.

In view of the history of this legislation in reference to the lands of the Choctaw and Chickasaw Nations we have not been able to find any well established rule of construction which in anywise aids the plaintiffs in error in their contention. On the contrary, the authorities refute every proposition for which they are contending, and sustain the construction first placed upon the Act of 1918 by the Secretary of the Interior as not only the only construction possible, but the only one which would carry out the plainly expressed intention of Congress.

In United States vs. Goldenberg, 168 U. S., 95, 42 L. Ed., 384, Mr. Justice Brewer states the rule as follows:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true that there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent

> reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

In Thompson vs. United States, 246 U. S., 547, 62 L. Ed., 876, Mr. Justice Clark says—

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

We submit that in arriving at the correct construction of this statute the remarks made by Honorable Charles D. Carter, Chairman of the Committee on Indian Affairs, heretofore quoted, are not only pertinent but are conclusive as to the intent of Congress when it wrote into this law the words "at the appraised value."

In this connection it should be considered that this was not a measure hastily considered and rushed through Congress. The report of the proceedings being public documents the Court will take judicial notice that the bill was introduced early in the year 1916; that the first hearing on it was had on March 9, 1916, at which time the Governors of the Choctaw and Chickasaw Nations, respectively, with their attorneys, were present and had inserted into said proceedings a Memorial requesting the sale of the Coal Lands and the passage of the bill.

A second hearing was had before the Committee of the House of Representatives on April 14, 1916.

A third hearing was had on June 20, 1916, at which hearing there was made a part of the proceedings a long review of the bill by Secretary Lane. This bill was reported favorably June 29, 1916.

The bill then went to the Senate, and there were hearings before the Senate Committee on Indian Affairs at which all interested parties were present, and the bill was not finally passed until February 8, 1918, two years after it was introduced.

In the United States vs. St. Paul Railway Company, 247 U. S., 310, Mr. Justice Pitney says:

> "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment." (Here follows numerous citations.) "But the reports of a Committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications." (Here follows numerous citations.) "The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; and not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy."

The statement of Mr. Carter, in answer to the question of Mr. Lenroot, was in the nature of a supplemental report of the committee, expressly calling attention of Congress to previous legislation upon this point and explaining what was meant by the expression "at its appraised value," as contained in the pending bill.

Let us refer again to this clause to which Mr. Carter's remarks were directed:

> "And that any lessee shall have the preferential right * * * to purchase at the appraised value any or all of the surface," etc.

In this connection it must be kept in mind that this was one of a series of Acts that had been passed for the purpose of alloting the lands of these Tribes and selling those portions of their property which had not been allotted, in order to close the estate and finally administer it by the Government. The rule that "Statutes are construed with reference to statutes in *pari materia,*" is especially applicable in this case.

This rule as stated by this Court in a long line of decisions, commencing in 1804 with the case of Pennington vs. Cox, 2 Cranch 33, 2 L. Ed., 199, down to the recent cases, is in substance as follows:

> "Where there are several statutes relating to the same subject, they are all to be considered together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and to pertain to the same system."

MANDAMUS A PROPER REMEDY.

The point for which we are contending in this case has been repeatedly before the courts.

Mr. Justice Field in delivering the opinion in the case of Quinby vs. Conlan, 104 U. S., 420, 26 L. Ed., 800, lays down this rule:

> "It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the Department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily effecting their judgment, that the courts can, in proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. Johnson vs. Towsley, 13 Wall., 72 (80 U. S., 485); Shepley vs. Cowan, 91 U. S., 330-340; Moore vs. Robbins, 96 U. S., 535."

The circumstances at the time of enactment of any statute should be considered in arriving at the intent of the legislation.

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the result of experience. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the

light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances." (Platt vs. Union Pacific Railroad, 98 U. S., 48.)

Another very clear statement of this rule is found in the case of Dewey vs. United States, 178 U. S., 510-520; 44 L. Ed., 1170. This was a case where there were strong reasons for placing a strained construction upon the plain wording of the statutes, to reward the skill and heroism of those who participated in the Battle of Manila, but the Court, speaking through Mr. Justice Harlan, said:

> "It thus appears that Congress, in providing for bounty to be paid by the United States on account of enemy vessels sunk or otherwise destroyed, by any ship or vessel belonging to the United States, has never prescribed any other rule than to give the smaller amount when the enemy's vessel was of inferior force, and the larger amount when the enemy's vessel was of equal or superior force. We are asked to construe the words in the present statute 'One Hundred Dollars if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force' to mean just what it would mean if the question of the inferiority or superiority of the enemy's vessel was made, by express words, to depend upon the inquiry whether it was or was not supported in the naval engagement by land batteries, mines and torpedoes under the charge of others than those having the management of the enemy's vessel. We cannot do that without going far beyond the obvious import of the words employed by Congress. Of course, our duty is to give effect to the

will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ, *interpreting such words according to their ordinary meaning, as well as in the light of all circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject.* There is undoubtedly force in the suggestion that in regarding officers and sailors who have sunk or destroyed the enemy's vessels in a naval engagement it is not unreasonable that all the difficulties, of every kind, with which they were actually confronted when engaging the enemy, should be taken into consideration. But that was a matter which we cannot suppose was overlooked by Congress; and we are not at liberty to hold that it proceeded upon the broad basis suggested."

In the case of Franklin K. Lane, Secretary of the Interior vs. Svan Hoglund, 244 U. S., 174-5, 61 L. Ed., 1066, Mr. Justice Van Devanter, delivering the opinion of the court, says:

"True, this court always is reluctant to award or sustain a writ of mandamus against an executive officer, and yet cases sometimes arise when it is constrained by settled principles of law and the exigency of the particular situation to do so. Kendall vs. United States, 12 Pet., 524, 9 L. Ed., 1181; United States vs. Schurz, 102 U. S., 378, 26 L. Ed., 167; Roberts vs. United States, 176 U. S., 221, 44 L. Ed., 443, 20 Sup. Ct. Rep., 62: Balinger vs. United States, 216 U. S., 240, 54 L. Ed., 464, 30 Sup. Ct. Rep., 338. And see Noble vs. Union River Logging Co., 147 U. S., 165, 37 L. Ed., 123, 13 Sup. Ct. Rep., 271; American School of Magnetic Healing vs. McAnnulty, 187 U. S., 94, 47 L. Ed., 90,

23 Sup. Ct. Rep., 33. This, we think, is such a case. As quite opposite we excerpt the following from the unanimous opinion in Roberts vs. United States, 176 U. S., 221, 231, 44 L. Ed., 443, 447, 20 Sup. Ct. Rep., 376.

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directed him to perform an act in regard to which no discretion is committed to him, and in which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and, therefore, it was not ministerial, and the court would, on that account, be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no

matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

"We, therefore, conclude that the Court of Appeals rightly directed that the writ be granted."

Counsel for plaintiffs in error have cited the cases of Ness v. Fisher, 223 U. S. 683; Knight v. Lane, 228 U. S. 6; Alaska Coal Company v. Lane, 250 U. S. 549; and Hall v. Payne, 254 U. S. 343, as sustaining their contention that the Court should not review the Secretary's action.

We submit that the decision in each of these cases was based upon the fact that the *law* upon which the suit was founded involved discretion on the part of the Secretary in determining what constituted compliance with the provisions of the law, and the Secretary's construction in each of those cases was held to be a permissible one, not arbitrary or capricious.

In *Ness v. Fisher, supra,* the Secretary had ruled that an application to purchase land under the Timber and Stone Act of June 3, 1878, where the applicant had not personally examined the land, basing her statement that it was unfit for cultivation, etc., upon information and belief, was objectionable, and therefore rejected it. It appears that this had been a continuous administrative construction. This Court held that—

"the Secretary's decision rejecting the relator's application, was not arbitrary or capricious, but was based upon a construction of Section 2 which was at least a possible one, had long prevailed in the Land Department, had been approved in United States v. Wood, 70 Fed. 485, and Hoover

> v. Salling, 102 Fed. 716, and has since been sustained by the Court of Appeals in the present case," and therefore that the action of the Secretary "was not arbitrary or merely ministerial, but made in the exercise of judgment and discretion *conferred by law*."

In *Knight v. Lane, supra,* the Secretary of the Interior, consented to a compromise agreement among certain contestants for an Indian allotment, and directed issuance of patents to certain of the contestants. The regulations of the Department governing such matters permitted a party to such a contest to apply for a rehearing within thirty days after decision by the Secretary. One of the contestants made such application within the time specified, and upon rehearing the Secretary reversed his previous decision. Whereupon one of the contestants, to whom a patent to the land had theretofore been directed to be issued, brought a mandamus suit to compel the Secretary to approve the patent. As this Court stated:

> "The question involved therefore was reduced to this: Was his" (the Secretary's) "power of decision exhausted when, on May 10, 1909, he approved the proposed adjustment? To this there can be only a negative answer. That decision was not final, but interlocutory. In terms it showed that the patent was not to be effective or delivered until he approved it, and the Act of 1902 declared that it must have his approval. (Sec. 59.) Not only so, but, no statutory provision opposing, effect was to be given to the regulation providing for rehearings, and allowing thirty days within which to apply therefor. Thus, it was as if the decision itself had made provision for a rehearing."

The case of *Alaska Coal Company v. Lane, supra,* involved a determination by the Secretary of the Interior of what is necessary to "open and improve * * * any coal mine or mines upon public lands." This Court held that "manifestly judgment in all cases must be exercised—judgment not only of the law but what was done under the law, and its sufficiency to avail of the grant of the law."

Counsel for plaintiffs in error quotes from the decision of this Court in the case of *Hall v. Payne, supra.* In that case there was involved the question of priority of homestead entries upon public lands which had been reserved for the State of Montana "from any adverse appropriation" for a period of sixty days after the filing of a certain authorized survey. One entryman filed prior to the expiration of the sixty-day period. His application was at first rejected by the Interior Department, but later the Department reversed its decision and held that, while the entryman's application could not become effective until after the sixty-day period, it would be treated as suspended only during that period. The day after the Department reversed its decision, Hall, the relator, performed certain acts of settlement on the land and thereafter, immediately upon the expiration of the sixty-day period, filed an application to enter it. The application was denied by the Department on the ground that it was subsequent to the application first referred to. Whereupon, suit was brought by Hall to compel the Secretary to recognize his entry. The Court said:

> "From the Act, and the Secretary's decision, it is apparent that the latter was not arbitrary or

> capricious, but rested on a possible construction of the Act, and one that the reported decisions of the Land Department show is being applied in other cases. The construction of the Act that the lands be reserved 'from any *adverse* appropriation' means necessarily an appropriation adverse to the state, and this gives color to the Secretary's view."

Then follows what is quoted by counsel for plaintiffs in error.

We have no fault to find with the proposition of law that where, in the exercise of his official duties, particularly with relation to the public lands and their acquisition, the Secretary of the Interior is called upon to interpret statutes of the United States, and the construction he places upon them, though adverse to the relators, is a possible one, the Court will not interfere to compel him to adopt a construction which he has thus indicated to be contrary to his judgment in the execution of a duty imposed upon him by law.

It is submitted that in the instant case no room is left by the statute for any legally possible construction by the Secretary of the Interior except that contended for by the Coal Company. It is earnestly and confidently asserted that when the Act of 1918, giving the lessees the preferential right to purchase, is read in connection with the Act of 1912, both being on the same subject, relating to the same subject-matter, and providing rights with reference to the same subject-matter, there can be no doubt either of the meaning of the Act itself or of the intention of Congress in its enactment.

Plaintiffs in error took the position in the court below that if, as a matter of fact, there had never been

an appraisement of this land, the clause which in the Act of 1918 granted the right to purchase "at the appraised price" would justify or even require an appraisement, although the Act contained no express words of direction further to that effect. This would be so if in fact no appraisement had been made. In that event, the words of the Act could refer to nothing except an appraisement to be made in the future. But an appraisement had been made. It had been made by express direction and authority of Congress, and Congress knew it. It had been made under the direction of the Secretary of the Interior, and the Secretary officially knew that it had been made. It was an existing fact brought about by the action of Congress, and recorded in the public records of the Indian Office of the United States. It had been published under authority of the Department of the Interior and widely distributed. Every Indian allottee and every lessee knew of it, and these facts will neither be denied nor disputed. The existence of this appraisement, known to Congress, to the Secretary of the Interior, and to every person directly or indirectly interested, is the fact that relieves the use of the words "appraised value" in the Act of 1918 of any possible ambiguity. It is inconceivable that Congress could have referred to anything else in the Act when it used these words. This view is fortified and strengthened when the Court's attention is called to the way the original appraisal was made. Under the Act of 1912 a classification and appraisal was required to be made within six months of the date of its passage, to be sworn to by the appraisers and to be approved by the Secretary of the Interior; the Secretary was authorized to prescribe such rules, regulations,

terms and conditions not inconsistent with the Act as he might deem necessary to carry out its provisions and there was directly appropriated out of the funds belonging to the Choctaw and Chickasaw Tribes of Indians the sum of $50,000.00 to pay the expenses of the classification, appraisement and sales provided for by the Act.

In view of the fact that the Act of 1918 does not authorize the expenditure of a dollar of the funds of these Indians, held in trust by the United States, for the purpose of the new appraisement, does not provide for it being made, sworn to, approved or made a matter of record in the Department, it seems to us, with all due respect to the opinion of the Secretary of the Interior and of the trial court, to be too plain for argument, that the only appraisement Congress could possibly have meant in the Act of 1918 was the appraisement already made under its specific direction and authority.

Although not contended for by the relator and no reference made thereto in the argument before the trial court, that Court seems to have based its decision, in part at least, upon the theory that by the petition for mandamus the relator sought to compel specific execution of a contract by the United States.

It is quite impossible for us to see how the Trial Court could have stated with reference to the Coal Company in the instant case as follows:

> "In essence, it seems to the court, the relator's position in this regard is, that it had entered into a binding contract with the United States for the acquisition of certain land, the power of its disposition, if not its ownership, being in the United States, to be exercised, if at all, it is true, by designated officers of the United States Government."

The Coal Company sought to exercise a preferential right to purchase given it directly by congressional authority. It has been refused, by the action of the Secretary of the Interior, both the right and the opportunity to exercise the preferential right given it by the Act. If a preferential right was accorded it, and the purchase price of the property accepted by the Secretary of the Interior as guardian for the Indians, there could be little doubt that the executive heads of the Indian Tribes could be compelled by mandamus proceedings to do that which the law required them to do under these circumstances, to wit, to execute the conveyance contemplated by the Act.

Can there be any doubt, if this conveyance had been made in accordance with the statute and contained the reservations commanded by law, and the purchase price had been paid, that the approval of the Secretary of the Interior to the same would be other than a purely ministerial act? The Coal Company seeks to be permitted to exercise a preferential right, not to compel the execution of a contract. Until it is accorded by proper authority the right to purchase at the appraised value, as provided by the Act of 1912, no contractural relations exist between it and any of the plaintiffs in error.

This theory, however, that a contractural situation developed from the recited facts, was not urged upon the Court below by the appellee, and it appears that the plaintiffs in error have abandoned it.

In the brief filed by plaintiffs in error there is contained the statement "It will be observed that Section 4 of the Act, in granting the preferential right to purchase surface lands, made no reference to the Act of

February 19, 1912, *supra*. Indeed that Act is not mentioned in the 1918 Act."

In this connection the Court's attention is especially called to the provision contained in Section 4 "that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by and *heretofore reserved by order of the Secretary of the Interior.*" The lands "heretofore reserved by order of the Secretary of the Interior" were so reserved under authority of the Act of February 19, 1912, and to that extent, at least, the Act of 1912 was referred to. But, further in the same section there is contained this proviso—"That nothing herein contained shall be construed as limiting or curtailing the rights of any lessee or owner of mineral estates from acquiring additional surface land for mining operations *as provided by the Act of Congress of February Nineteenth, 1912.*" Furthermore, it is submitted that inasmuch as the Act of 1918 was merely one of a series of acts passed for the purpose of disposing of the property of the Choctaw and Chickasaw Tribes in order to close their estate, the rule that "statutes are construed with reference to statutes *in pari materia*" is especially applicable. Pennington v. Cox, *supra*.

Counsel for plaintiffs in error also refers to the enhancement of values of these surface lands between the years 1912 and 1918, and says, in support of his contention that Congress intended a subsequent appraisement, "it, therefore, was entirely proper and sensible for the Secretary to adopt a construction that would

not impute to Congress an intention to sanction an unbusinesslike plan"; that "the United States in selling the lands was acting as trustee for its Indian wards" and that "it would indeed be poorly discharging its obligation as such trustee to permit its wards' lands to be purchased at a price representing only half their value."

On the contrary, is it proper and sensible for the Secretary to adopt a construction that would impute to Congress an intention to sanction an unfair and inequitable dealing on the part of the Government's wards with others who had in good faith purchased from them mineral rights "at the highest price offered by any reasonable bidder at public auction at not less than the appraised value," and who had made large investments for improvements thereon upon the assurance that they would be permitted to purchase the surface of the lands overlying said minerals at an appraised price theretofore fixed and publicly announced? Is it the duty of anyone, even a trustee, to indulge in sharp practices and to take unfair advantage of another who has acted in good faith and invested money upon the assumption that the other party to the contract would also act in good faith?

Counsel for plaintiffs in error inquire "Had Congress meant 'the appraised value' to be the appraisal under the 1912 Act, what could have been more easy than to have said so?" To this we might inquire, Why, the necessity, as there was in being *an appraisement* at the time Congress was dealing with the measure and to what else could it refer than to the appraisement then existing and known to Congress as expressed in the statement of Mr. Carter, Chairman of the Committee of Indian Affairs? If a new or further

appraisement was contemplated why was it not so directed as in the Act of 1912?

Counsel for plaintiffs in error also ask the question "Now, if the surface was to be sold under the 1912 Act appraisal, what was the reason for delaying the sale until after the appraisal of the minerals had been made?" Common business experience should make this clear. The Coal Company would not desire the coal without the surface. It would not desire the surface without the coal. It knew the appraised value of the surface, the appraisal of 1912, at the time of passage of the Act. It did not know the appraisal of the mineral, as it was yet to be made under the provisions of the Act. If the appraisement of the mineral had been abnormally high it would not be in the market for either the surface or mineral; consequently the preferential right need not be exercised until ninety days after the appraisal of the mineral, thus giving a reasonable time for the Coal Company to make decision with all the information at hand and yet make its decision prior to the sale of the mineral.

We submit that Associate Justice Van Orsdel, in his opinion, ably states the true position in this cause:

> "No discretion was reposed in the Secretary except to ascertain the facts which would bring appellant company within the class upon whom Congress conferred the right. That appellant company did comply with every requirement of law except to yield to the erroneous interpretation of the statute, is conceded by respondents in their answer. It, therefore, appears that nothing remains in the present case for the Secretary to do except the mere ministerial case of accepting the balance of the purchase price and of directing the issuance of a patent." (Rec., page 40.)

* * * * * * * * *

"The Secretary refuses to perform a purely ministerial act, solely upon a construction which he places upon the law, and insists that the court has no power in this sort of proceeding to disturb his conclusion. No discretion is committed to the Secretary in respect of the performance of the duties imposed by the statute in this case. The right of appellant company to purchase the land under one or the other appraisement is absolute, and the court is not foreclosed from deciding which the Secretary should apply." (Rec., page 41.)

CONCLUSION.

If it be possible for the Court to sustain and render effective the plain intention of Congress as expressed in the Acts of 1912 and 1918, it surely seems that the Court will be sedulous so to do in the instant case. Relying upon the action of the Secretary of the Interior which appeared to it to be plain law, and in accordance with the expressed intention of Congress the Coal Company made its partial payments upon the surface lands which it had a preferential right to purchase, and thereafter purchased the coal deposits thereunder, which it would not have done had the ruling of the Secretary been otherwise.

Relying upon the validity of the Secretary's action it made wide and extensive improvements on the surface land so purchased to develop its property. This action would never have been taken nor these expenditures incurred had the Coal Company been possessed of only a lease-hold interest, and not of the preferential right to acquire the fee to all intents and purposes. The action of the Secretary of the Interior in reversing his first decision is not authorized by the law, and is arbitrary and capricious in that it disregards the completely manifested intention of Congress in the premises.

The present attitude of the Secretary compels the Coal Company either to pay an unauthorized and much larger price for the surface lands, or lose the permanent improvements it has placed upon them, and the doubt still remains as to whether or not, even should the Coal Company comply with these conditions, its preferential right would thereby be established. If the Coal Company cannot buy the surface lands as provided in the Act of 1918, at the appraisal made in 1912, as it supposed was its right, then it is now in the position of having purchased the coal deposits irrevocably notwithstanding that at the time of making this purchase it was made only on the assumption that it had the right to purchase the surface necessary to make the coal deposits available at the price theretofore fixed by Congressional authority.

The Court will at once see the great injustice the Coal Company has suffered, and the greater injustice it will be subjected to if the attitude of the Secretary be sustained. The meaning and intent of the Act of Congress is so plain and the discussion in the House of Representatives is so illuminating as to this meaning and intention that the Coal Company feels no hesitation in urging upon the Court the propriety and necessity of compelling the Secretary of the Interior and the Tribal officers to perform the duty cast upon them by the Act of 1918.

The judgment below should be affirmed.

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